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## The Emergence of First Amendment Academic Freedom

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# The Emergence of First Amendment Academic Freedom

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## I. INTRODUCTION

The idea of a constitutionally protected realm of academic freedom is controversial and judicially unsettled.<sup>1</sup> With their most protective rhetoric, courts have referred to “the robust tradition of academic freedom in our nation’s post-secondary schools.”<sup>2</sup> The Supreme Court has proclaimed that

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- \* Lawrence A. Jegen III Professor of Law, Indiana University School of Law—Indianapolis. A.B. 1972, University of Virginia; Ph.D. 1976, Indiana University; J.D. 1982, Indiana University. The author expresses his gratitude and appreciation for the research assistance of Rachel Anne Scherer. The author frankly concedes the alignment of professional self-interest and the normative recommendations below, denying only the relevance of any possible monopoly rent-seeking behavior to the strength or weakness of the argument. For a standard public-choice theory cite, see, for example, Gordon Tullock, *The Welfare Costs of Tariffs, Monopolies, and Theft*, 5 W. ECON. J. 224 (1967).
1. Some of the potential conflicts between academic freedom as a constitutionally protected value exercised by individual faculty members and their state-subsidized universities were recently hinted at in the government workplace case of *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006). The *Garcetti* case is discussed *infra* Part III, notes 150–83 and accompanying text.
  2. *Hardy v. Jefferson Cmty. Coll.*, 260 F.3d 671, 680 (6th Cir. 2001) (offensive classroom language). Note that *Hardy* involves a classroom teacher at the level of

[o]ur Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.<sup>3</sup>

Beyond the strands of supportive rhetoric, however, lies much current controversy and uncertainty. One court has observed that "[a]cademic freedom" is a term that is often used, but little explained, by federal courts.<sup>4</sup> Academic freedom is largely unanalyzed,<sup>5</sup> undefined,<sup>6</sup> and unguided by principled application,<sup>7</sup> leading to its inconsistent<sup>8</sup> and skeptical or questioned invocation.<sup>9</sup>

Thus, the relationship between academic freedom and the First Amendment is typically left unclear. Could any teachers ever have special academic freedom claims that are not subsumed under general First Amendment doctrine?<sup>10</sup> If university administrations and boards of trustees themselves have academic freedom claims of any sort,<sup>11</sup> do those claims fall equally within the logic of freedom of

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state-funded or public institutions like community, technical, or junior colleges. The rhetoric of academic freedom often declines to distinguish between, say, the graduate level seminar and the community college, or even between public and private educational institutions.

3. *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (citations omitted). Note that this language seems to suggest that academic freedom is at least in some contexts a matter of the First Amendment directly. Note also the implied suggestion that academic freedom can be exercised by individual instructors, perhaps along with or against university administrative officials. Those officials may in turn also hold separate sorts of academic freedom, exercisable against either individual instructors or against public officials outside the university who seek to influence university policy or practice. *See infra* notes 79–98 and accompanying text.
4. *Urofsky v. Gilmore*, 216 F.3d 401, 410 (4th Cir. 2000) (en banc).
5. *Id.* (stating that "courts are remarkably consistent in their unwillingness to give analytical shape to the rhetoric of academic freedom" (internal quotation marks omitted) (quoting W. Stuart Stuller, *High School Academic Freedom: The Evolution of a Fish Out of Water*, 77 NEB. L. REV. 301, 302 (1998))).
6. *See Urofsky*, 216 F.3d at 410 ("Lacking definition or guiding principle, the doctrine [of academic freedom] floats in the law, picking up decisions as a hull does barnacles." (alteration in original) (internal quotation marks omitted) (quoting J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment,"* 99 YALE L.J. 251, 253 (1989))).
7. *See id.*
8. *See id.* (citing Stuller, *supra* note 5, at 303).
9. *See Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1265–66 (10th Cir. 2005); *Urofsky*, 216 F.3d at 410 (citing Byrne, *supra* note 6, at 262–64).
10. *See, e.g., Trejo v. Shoben*, 319 F.3d 878, 884 n.3 (7th Cir. 2003) (claimant's allegedly separate academic freedom claim as subsumed within a broader First Amendment claim, where the broader First Amendment scope affords some degree of protection for academic freedom (citing *Zykan v. Warsaw Cmty. Sch. Corp.*, 631 F.2d 1301, 1304 (7th Cir. 1980); RONALD DWORKIN, *FREEDOM'S LAW* 247–50 (1996))).
11. For a discussion, see, for example, David M. Rabban, *Functional Analysis of "Individual" and "Institutional" Academic Freedom Under the First Amendment*, 53

speech?<sup>12</sup> Assuming that only public universities are bound to respect First and Fourteenth Amendment free speech rights, does the logic of academic freedom nonetheless suggest any guidance for private universities?<sup>13</sup>

The existence of the First Amendment itself has not yet brought clarity regarding the degree, if any,<sup>14</sup> to which a college professor's<sup>15</sup> or other public school teacher's<sup>16</sup> classroom speech is protected explicitly, in academic freedom terms or not, under the First Amendment. There are ringing declarations to the effect that

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LAW & CONTEMP. PROBS. 227 (1990). See also *Urofsky*, 216 F.3d at 414 (stating that "the Court has never recognized that professors possess a First Amendment right of academic freedom to determine for themselves the content of their courses and scholarship"); *id.* at 412 (stating that "the Supreme Court has never set aside a state regulation on the basis that it infringing a First Amendment right to academic freedom"); *id.* at 410 (stating that "to the extent that the Constitution recognizes any right of 'academic freedom' above and beyond the First Amendment rights to which everyone is entitled, the right inheres in the University, not in individual professors").

12. In one instance involving production of a religiously controversial play, Judge Posner aligned college teachers and university administrators together in a court claim brought by citizen outsiders. See *Linnemeier v. Bd. of Trs. of Purdue Univ.*, 260 F.3d 757, 760 (7th Cir. 2001) ("Classrooms are not public forums; but the school authorities and the teachers, not the courts, decide whether classroom instruction shall include works by blasphemers."). Judge Posner explicitly noted the distinction and possible conflict between individual teacher academic freedom and the academic freedom or institutional autonomy of a school and its administration in the artwork relocation case of *Piarowski v. Illinois Community College District*, 759 F.2d 625, 629 (7th Cir. 1985).
13. For an exploration of some of the basic logic of state action, see R. George Wright, *State Action and State Responsibility*, 23 SUFFOLK U. L. REV. 685 (1990).
14. See *supra* note 11 (quoting the en banc majority opinion in *Urofsky*, 216 F.3d at 414, 412, 410). *Urofsky* involved a state statute restricting state employee access to sexually explicit materials via state computers without supervisory authorization. See also, e.g., *Edwards v. Cal. Univ.*, 156 F.3d 488, 491 (3d Cir. 1998) ("[W]e conclude that a public university professor does not have a First Amendment right to decide what will be taught in the classroom." (citing *Bradley v. Pittsburgh Bd. of Educ.*, 910 F.2d 1172, 1176 (3d Cir. 1990) (holding that high school, as distinct from university, teacher not entitled to choose own curriculum or classroom management style contrary to school policy))). The opinion in *Edwards* was written by then-Circuit Judge Samuel Alito.
15. See, e.g., *Cohen v. San Bernardino Valley Coll.*, 92 F.3d 968, 971 (9th Cir. 1996) (stating that "[n]either the Supreme Court nor this Circuit has determined what scope of First Amendment protection is to be given a public college professor's classroom speech" in context of alleged hostile learning environment attributed to professor's sexually oriented classroom language).
16. See, e.g., *Cal. Teachers Ass'n v. State Bd. of Educ.*, 271 F.3d 1141, 1148 (9th Cir. 2001) (observing that "[n]either this court nor the Supreme Court has definitively resolved whether and to what extent a teacher's instructional speech is protected by the First Amendment" in the context of classroom teachers requiring parental enforcement of English-only language rules (citing *Cohen*, 92 F.3d at 971; Karen C. Daly, *Balancing Act: Teachers' Classroom Speech and the First Amendment*, 30 J.L. & EDUC. 1, 6 (2001))).

the First Amendment protects the right of faculty members to engage in academic debates, pursuits, and inquiries and to discuss "ideas, narratives, concepts, imagery, [and] opinions—scientific, political or aesthetic—[with] an audience whom the speaker seeks to inform, edify, or entertain."<sup>17</sup>

At the same time, other lines of authority suggest that such academic freedom rights under freedom of speech may be limited<sup>18</sup> if they exist at all, and may not extend beyond the rights available to any nonteacher.<sup>19</sup>

It is not surprising, given this confusion, that the courts have not yet settled upon a single judicial test in addressing First Amendment academic freedoms of teachers at any level of schooling.<sup>20</sup> For the sake of initial simplicity, we may reduce the major test contenders to two,<sup>21</sup> but each of these two major contending tests has generated its own significant variations and offshoots.<sup>22</sup>

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17. *Trejo v. Shoben*, 319 F.3d 878, 884 (7th Cir. 2003) (alleged sexually charged comments at off-campus professional conference classified as unprotected speech on matters of private interest and concern (alteration in original) (quoting *Swank v. Smart*, 898 F.2d 1247, 1251 (7th Cir. 1990))). See also *Pugel v. Bd. of Trs.*, 378 F.3d 659, 668–69 (7th Cir. 2004) (similarly quoting *Swank* in the context of dismissal of graduate student for alleged academic misconduct).
  18. See, for example, the sources cited *supra* note 14. See also *Johnson-Kurek v. Abu-Absi*, 423 F.3d 590, 593 (6th Cir. 2005) ("To the extent the Constitution recognizes any right of 'academic freedom' above and beyond the First Amendment rights to which every citizen is entitled, the right inheres in the University, not in individual professors." (quoting *Urofsky*, 216 F.3d at 410)). The question of what First Amendment rights any citizen would hold if such citizen were placed in the position of teaching a graduate seminar is close to unhelpful, if not meaningless.
  19. See *Urofsky*, 216 F.3d at 411 n.13 (noting that "the argument raises the specter of a constitutional right enjoyed by only a limited class of citizens"). Presumably any account of constitutionally enforceable academic freedom will wish to avoid any elements of unjustified privileging or elitism. By way of loose analogy, the Court has in several contexts declared that the rights of journalists, even under the Free Press Clause, do not extend beyond those of non-journalists. See, e.g., *Pell v. Procunier*, 417 U.S. 817, 833–34 (1974); *Branzburg v. Hayes*, 408 U.S. 665, 684–85 (1972).
  20. For a recent reference to the circuit split on teacher free speech rights, see *Lee v. York County School Division*, 418 F. Supp. 2d 816, 821–24 n.5 (E.D. Va. 2006). For other references, also see *Chiras v. Miller*, 432 F.3d 606, 617 n.29 (5th Cir. 2005), and *Bishop v. Aronov*, 926 F.2d 1066, 1074–77 (11th Cir. 1991).
  21. See *infra* notes 23–24. For purposes of this constitutional analysis, we think of public university tenure systems, formal and informal, as well as promotion and post-tenure review processes, as a matter of state statutory or administrative law, state contract law, and of procedural due process. See *Bd. of Regents v. Roth*, 408 U.S. 564 (1972); *Perry v. Sindermann*, 408 U.S. 593 (1972). Such arrangements may be constrained by the First and Fourteenth Amendments.
  22. For a sense of some of the possibilities, see the circuit split between versions of the *Hazelwood* and the *Pickering-Connick* tests, cited in *Chiras*, 432 F.3d at 615 n.27, and in *Bishop*, 926 F.2d at 1072–77 (citing various considerations), and the teacher-as-agent language in cases discussed *infra* notes 171–83 and accompanying text.

The two most popular general contenders, neither of which seems reducible to the other, are the *Hazelwood* test<sup>23</sup> and the *Pickering-Connick-Garcetti* test.<sup>24</sup> To dramatically oversimplify, in applying the *Hazelwood* test to teacher speech the first question is whether the teacher's speech could reasonably be perceived to reflect the approval of the school administration.<sup>25</sup> If so, regulation of the teacher's speech can be justified if the speech restriction is reasonably related to any legitimate pedagogical concern.<sup>26</sup> Whether such a regulation, unlike regulation of speech in typical nonpublic forum cases,<sup>27</sup> could be based on the viewpoint or message of the teacher's speech is unclear and has divided the circuits.<sup>28</sup>

The main alternative to *Hazelwood* is the *Pickering-Connick-Garcetti* test,<sup>29</sup> or for convenience hereafter, the "PCG" test. It would be an understatement to say that the PCG test involves important complications and uncertainties. In the interests of simplicity, though, we can say that the PCG test first asks whether the teacher's speech addresses a matter of public interest and concern [hereinafter, occasionally, a MOPIC].<sup>30</sup> It has been suggested that a teacher's broadly curricular speech cannot rise to the level of speech on a MOPIC.<sup>31</sup> If, on the other hand, the teacher's speech is shown to address a MOPIC, the court then undertakes an interest balancing. The court weighs the teacher-employee's<sup>32</sup> interest in speaking against the government-employer's<sup>33</sup> interest in the efficiency, discipline, mo-

23. See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 267-69 (1988). For some applications of *Hazelwood* to in-class teacher speech at various levels, see the cases cited in *Cockrel v. Shelby County School District*, 270 F.3d 1036, 1055 n.7 (6th Cir. 2001).

24. "*Pickering*" refers to *Pickering v. Board of Education*, 391 U.S. 563, 574-75 (1968); "*Connick*" refers to *Connick v. Myers*, 461 U.S. 138, 146-49 (1983); and "*Garcetti*" refers to *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1959-62 (2006).

25. See *Hazelwood*, 484 U.S. at 273.

26. See *id.*

27. See, e.g., *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 806 (1985); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983).

28. For a recent tabulation of the split on viewpoint-based speech regulations under *Hazelwood*, see *Chiras v. Miller*, 432 F.3d 606, 615 n.27 (5th Cir. 2005). See also R. George Wright, *School-Sponsored Speech and the Surprising Case for Viewpoint-Based Regulations*, 31 S. ILL. L.J. (forthcoming 2007).

29. See *supra* note 24 and accompanying text.

30. See, e.g., *Urofsky v. Gilmore*, 216 F.3d 401, 407 (4th Cir. 2000) (en banc); *Connick v. Myers*, 461 U.S. 138, 146-47 (1983).

31. See, e.g., *Boring v. Buncombe County Bd. of Educ.*, 136 F.3d 364, 368-69 (4th Cir. 1998) (en banc); *Lee v. York County Sch. Div.*, 418 F. Supp. 2d 816, 824-25 (E.D. Va. 2006).

32. At some point, presumably, the interests of the immediate and perhaps the more indirect audience in hearing the speech should be factored into the balance. See *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1958-59 (2006).

33. We may assume that references to the government employer's interests encompass the interests of the broader public in effective governmental operation.

rale, and overall appropriate operation of the government workplace.<sup>34</sup>

For the teacher's speech to be protected under *PCG*, the speech thus must, at a minimum, address a matter of public interest and concern, and the teacher's interest in speaking must outweigh the conflicting government workplace interests.<sup>35</sup> In addition, however, the Supreme Court in *Garcetti* has recently validated a number of lower courts in insisting that the speaker also have spoken in the capacity of a citizen, rather than in the capacity of a task-discharging government employee.<sup>36</sup>

The latter idea seems to be that speaking as a government employee pursuant to employee responsibilities, as opposed to as a citizen, is a crucially distinct role.<sup>37</sup> Speech uttered in one's role as public employee, perhaps including as a teacher discharging one's obligations as a teacher,<sup>38</sup> is thus not speech uttered as a citizen. Such public employee speech is not, in general, eligible under *Garcetti* for constitutional protection.<sup>39</sup> This result may rely on a theory that speech in one's employee capacity must inescapably also be speech that is merely on a matter of personal interest. Or perhaps the theory is that speaking merely in one's employee capacity, even on a matter of great public interest, must, given the conflicting interests, always be decisive against free speech protection.<sup>40</sup>

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34. See, e.g., *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968); *Cockrel v. Shelby County Sch. Dist.*, 270 F.3d 1036, 1052–56 (6th Cir. 2001); *Urofsky*, 216 F.3d at 406.

35. See, e.g., *Waters v. Churchill*, 511 U.S. 661, 668 (1994).

36. See *Garcetti*, 126 S. Ct. at 1957–61; *Boring*, 136 F.3d at 368–69. But cf. *Cockrel*, 270 F.3d at 1051–52 (critiquing the view that public school teachers' classroom speech is speech on matters of personal, and not public, interest because it is made as an employee).

37. But cf. *Garcetti*, 126 S. Ct. at 1961–62 (recognizing that formal job description may not be decisive in classifying speech as made in one's capacity as citizen or as employee).

38. The majority in *Garcetti* sought to set aside the question of any possible revisions of the basic *PCG* rule in contexts raising significant concerns for academic freedom. See *id.* at 1962.

39. See *id.* at 1960 ("We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employee discipline."). Again, the majority in *Garcetti* sought to set aside government employee speech cases raising academic freedom issues. See *id.* at 1962.

40. The cases are not entirely clear on whether speaking pursuant to one's employee status and responsibilities is itself disqualifying, or whether speech in such capacity means that the speech cannot, somehow, be on a matter of public interest, however that idea is defined. For hints, but no consistent and unequivocal theory, see, for example, *Garcetti*, 126 S. Ct. at 1957–61; *Boring*, 136 F.3d at 368–69; and *Cockrel*, 270 F.3d at 1051–52. A desire to not encourage raising employee

In any event, the *Hazelwood* and the *PCG* tests, with their offshoots and complications, form much of the basis upon which constitutional academic freedom cases at various academic levels are typically resolved. In Part II below, we develop a context for critiquing all of the standard judicial approaches to claims of constitutional academic freedom. Part II briefly introduces the idea of fundamental underlying purposes or missions of major universities.<sup>41</sup> We then draw upon the explicit understanding of the universities themselves as to the vital role that academic freedom must play in promoting the basic purposes or missions of the university.<sup>42</sup>

We then note the distinction between the academic freedom of individual faculty members and groups thereof on the one hand, and academic freedom as institutional autonomy and self-directedness at the level of the university administration or board of trustees on the other.<sup>43</sup> This distinction is then used to briefly address the extent to which private universities with distinctive religious missions might either fit or not fit within the academic freedom paradigm.<sup>44</sup> We then more generally link academic freedom to basic values and purposes underlying the idea of constitutional protection for free speech.<sup>45</sup>

In light of the above, we briefly characterize the sorts of academic freedom that are most worthy of constitutional protection as “emergent phenomena.”<sup>46</sup> The point is not to trace historically or through case law how academic freedom has developed or been limited. Instead, we borrow the idea of “emergence” in a loosely philosophical sense.<sup>47</sup> The idea is roughly that an object can come into being with important characteristics that could not have been inferred from the elements and circumstances that have combined to create the emergent phenomenon. In this case, the emergent phenomenon is academic freedom worthy of constitutional protection.

Based on this understanding, Part III critiques a number of aspects of the major contemporary judicial tests applied to claims of academic freedom. None of the major judicial tests and their offshoots work well, and all are commonly inappropriate.<sup>48</sup> A brief conclusion<sup>49</sup> emphasizes that the scope and strength of academic freedom should track not the current judicial tests, but instead the considerations de-

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grievances to constitutional status would seem consistent with either of these theories.

41. See *infra* section II.A.

42. See *infra* section II.B.

43. See *infra* section II.C.

44. See *infra* section II.D.

45. See *infra* section II.E.

46. See *infra* section II.E.

47. See *infra* section II.E.

48. See *infra* Part III.

49. See *infra* Part IV.



veloped in Part II. In particular, constitutional protection of academic freedom should track the logic of academic freedom as an “emergent” phenomenon<sup>50</sup> in the context of university missions and the efficient pursuit of those missions. This will generally require more rigorous First Amendment protection of academic freedom than is currently afforded.

## II. THE UNIVERSITY AND THE LOGIC OF ACADEMIC FREEDOM

### A. University Missions

If academic freedom is to be found worthy of constitutional protection in even limited circumstances, surely it must be defended, as must freedom of speech itself as a constitutional value, largely in terms of the purposes underlying academic freedom and freedom of speech. In a generally similar way, we can also think of a major university as having aims, values, missions, or purposes that it fulfills more or less well. These aims will tend to be similar among the major nonreligious universities.

As it turns out, at least some of the most widely recognized purposes of major universities are directly and substantially, indeed indispensably, supported by freedom of speech and by academic freedom. The typical major contemporary university, simply put, cannot reasonably fulfill its basic purposes without relevant dimensions of freedom of speech, and specifically academic freedom. To best see this, we must specify some of the most important purposes or values underlying freedom of speech and see how these purposes in turn either directly support, or are in fact identical with, basic purposes, functions, and goals of the university.

Our starting point could easily vary, but for the sake of a start, we might begin with the current statement of overall mission and core values of the University of Cambridge.<sup>51</sup> Cambridge declares that its mission “is to contribute to society through the pursuit of education, learning, and research at the highest international levels of excellence.”<sup>52</sup> The university emphasizes the contribution it “can make to society through the pursuit, dissemination, and application of knowledge.”<sup>53</sup> Cambridge cites only two core values, the first being “free-

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50. See *infra* Part IV.

51. See The University's Mission and Core Values, <http://www.admin.cam.ac.uk/univ/mission.html> (last visited June 10, 2006).

52. *Id.*

53. *Id.*

dom of thought and expression,"<sup>54</sup> and the second being "freedom from discrimination."<sup>55</sup>

A similar sense of mission is conveyed by the University of Oxford. Oxford's mission statement refers to excellence in teaching and research, and to "enriching the international, national, and regional communities through the fruits of its research and the skills of its graduates."<sup>56</sup> To similar effect, Harvard College, the undergraduate program of Harvard University, specifies that "Harvard strives to create knowledge,<sup>57</sup> to open the minds of students to that knowledge, and to enable students to take best advantage of their educational opportunities."<sup>58</sup> The Harvard College Mission Statement then immediately specifies that "[t]o these ends, the College encourages students to respect ideas and their free expression."<sup>59</sup>

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54. *Id.*

55. *Id.* Cambridge does not address therein the possibilities of conflict between their two core values. For discussion of resolving some such conflicts under United States constitutional principles, see R. George Wright, *Dignity and Conflicts of Constitutional Values*, 43 SAN DIEGO L. REV. 527 (2006).

56. Mission Statement of University of Oxford: 2000, <http://www.admin.ox.ac.uk/admi/mission.shtml> (last modified Feb. 4, 2002).

57. The emphasis on the creation and dissemination of new knowledge, according to T.H. Huxley, was not characteristic of the university in all historic eras. Huxley has been quoted as maintaining in a letter of April 11, 1892, that "[t]he medieval university looked backward; it professed to be a storehouse of old knowledge. . . . The modern university looks forward, and is a factory of new knowledge." ROBERT ANDREWS, *THE COLUMBIA DICTIONARY OF QUOTATIONS* 947 (1993). Presumably, any university would strike one sort of balance or another between the two, if only for the sake of its preferred orientation.

58. What is Harvard's Mission Statement, [www.harvard.edu/siteguide/faqs/faq110.html](http://www.harvard.edu/siteguide/faqs/faq110.html) (last visited June 10, 2006).

59. *Id.* See also University of Michigan, Mission Statement, <http://www.umich.edu/pres/mission.html> (last visited June 18, 2006) ("The mission of the University of Michigan is to serve the people of Michigan and the world through preeminence in creating, communicating, preserving and applying knowledge, art, and academic values, and in developing leaders and citizens who will challenge the present and enrich the future."); The University of Texas at Austin, Core Purpose and Values, <http://www.utexas.edu/welcome/mission.html> (last visited June 19, 2006) (stating that "[t]he university contributes to the advancement of society through research, creative activity, scholarly inquiry and the development of new knowledge" and referencing "[f]reedom—to seek the truth and express it" as a "core value"). Under the admittedly distinctive historical influence of Thomas Jefferson, the current Statement of Purpose and Goals of the University of Virginia begins by declaring that "[t]he central purpose of the University of Virginia is to enrich the mind by stimulating and sustaining a spirit of inquiry directed to understanding the nature of the universe and the role of mankind in it." University of Virginia, Statement of Purpose and Goals, <http://www.virginia.edu/statementofpurpose/purpose.html> (last visited June 19, 2006). See also, e.g., Role and Mission of the University of Southern California, <http://www.usc.edu/about/mission> (last visited June 19, 2006) ("The central mission of the University of Southern California is the development of human beings and society as a whole through the cultivation and enrichment of the human mind and spirit.").

## B. University Missions and Academic Freedom

We see from these and other representative university mission statements<sup>60</sup> that mission statements from influential public and private universities tend to emphasize some common themes. Among these, certainly, are research and the generation and transmission of knowledge directly to students, and perhaps less directly, in some form to broader publics.<sup>61</sup> The effective pursuit of these aims is typically thought to require one form or another of academic freedom or freedom of thought and discussion.<sup>62</sup>

Similar, if not magnified, senses of the university's mission, and even of the necessary role of some form of academic freedom in fulfilling that mission, can be drawn from the broader culture as well. John Donne exclaimed enthusiastically that "[t]he University is a Paradise, Rivers of Knowledge are there, Arts and Sciences flow from thence[,] bottomless depths of unsearchable Counsels there."<sup>63</sup> More poignantly, Thomas Hardy's young Jude Fawley reflects in this way on the distant Christminster:

"It is a city of light," he said to himself.

"The tree of knowledge grows there," he added a few steps further on.

"It is a place that teachers of men spring from and go to."

"It is what you may call a castle, manned by scholarship and religion."<sup>64</sup>

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60. See, for example, those collected *supra* note 59. For a condensed survey and history of university missions and modern academic freedom with pointed commentary, see Lee C. Bollinger, Benjamin N. Cardozo Lecture on Academic Freedom (Mar. 23, 2005), available at [http://www.columbia.edu/news/05/03/cardozo\\_lecture.html](http://www.columbia.edu/news/05/03/cardozo_lecture.html). President Bollinger emphasizes the university mission of inculcating intellectual virtues. For one reaction by a fellow free speech specialist, see Posting of Steven Shiffrin to Left2Right, [http://left2right.typepad.com/main/2005/11/bollinger\\_acade.html](http://left2right.typepad.com/main/2005/11/bollinger_acade.html) (Nov. 25, 2005, 14:30 EST).
  61. See *supra* notes 51–59 and accompanying text.
  62. See *supra* notes 51–59 and accompanying text. In the case of Harvard, see the early expression of President Charles W. Eliot, *Academic Freedom*, 26 SCIENCE 1, 1–12 (1907). It is certainly also possible to value the autonomy associated with some forms of academic freedom for its own sake. The emphasis in most of the university mission statements that explicitly address academic freedom, however, is rather more on the instrumental value of academic freedom to the further aims and purposes of the university, including the acquisition and dissemination of knowledge. This instrumental focus is clearly central to most judicial accounts as well. See, e.g., *Pugel v. Bd. of Trs.*, 378 F.3d 659, 668 (7th Cir. 2004) (referring to "the University's mission of intellectual enhancement and research").
  63. John Donne, *Title page* to DOROTHY L. SAYERS, GAUDY NIGHT (Harper 1995) (1936) (quote used as a prefatory epigram to a mystery set largely at an Oxford University reunion). A bit more prosaically, the philosopher D.W. Hamlyn opines that "whatever branches of knowledge a university concentrates on, and for whatever reason, the overriding consideration ought to be the furtherance of knowledge both now and in the future." D.W. Hamlyn, *The Concept of a University*, 71 PHIL. 205, 218 (1996).
  64. THOMAS HARDY, JUDE THE OBSCURE 30 (Signet 1980) (1895). See also EVELYN WAUGH, BRIDESHEAD REVISITED 21 (Back Bay Books 1999) (1944) ("Oxford, in those days, . . . exhaled the soft vapours of a thousand years of learning.").

The metaphor of light is taken up not only in the famous Yale motto of "Lux et Veritas,"<sup>65</sup> but in judgments, such as that of Benjamin Disraeli, that "[a] University should be a place of light, of liberty, and of learning."<sup>66</sup>

By way of summary, we have John Henry Newman's classic declaration that

a university . . . is the place to which a thousand schools make contributions; in which the intellect may safely range and speculate, sure to find its equal in some antagonist activity, and its judge in the tribunal of truth. It is a place where inquiry is pushed forward, and discoveries verified and perfected, and rashness rendered innocuous, and error exposed, by the collision of mind with mind, and knowledge with knowledge.<sup>67</sup>

Newman's formulation, too, brings some idea of academic freedom into the descriptive essence of the university at its best, particularly in its reference to the space within which "the intellect may safely range and speculate."<sup>68</sup>

Certainly the leading universities themselves endorse in various and broader contexts some idea of academic freedom as closely supportive of, if not inherent in, at least some portion of the university mission. The important *1915 Declaration of Principles* adopted by the American Association of University Professors endorsed academic freedom in the sense of "freedom of inquiry and research; freedom of teaching within the university or college; and freedom of extramural utterance and action."<sup>69</sup> Contemporary declarations by major individual universities generally track and expand on this early expression.

As a reasonably typical further example, consider some key elements of the academic freedom and responsibility policy adopted by the University of Pennsylvania:<sup>70</sup>

It is the policy of the University of Pennsylvania to maintain and encourage freedom of inquiry, discourse, teaching, research, and publication and to protect any member of the academic staff against influences, from within or without the University, that would restrict him or her in the exercise of these freedoms in his or her area of scholarly interest. The teacher is entitled to freedom in research and in the publication of results, subject to . . . the institu-

65. See, e.g., The Yale University Shield, [http://www.yale.edu/secretary/yale\\_shield.html](http://www.yale.edu/secretary/yale_shield.html) (last visited June 20, 2006).

66. See ANDREWS, *supra* note 57, at 947, available at <http://www.bartleby.com/66/18/16818.html>.

67. JOHN HENRY NEWMAN, *THE IDEA OF A UNIVERSITY* 472–73 (1927).

68. *Id.* at 472.

69. COMM. ON ACADEMIC FREEDOM & ACADEMIC TENURE, AM. ASS'N OF UNIV. PROFESSORS, *1915 DECLARATION OF PRINCIPLES* (1915), <http://www.akronaaup.org/documents/AAUP1915.pdf>.

70. UNIV. OF PA., *HANDBOOK FOR FACULTY & ACADEMIC ADMINISTRATORS: A SELECTION OF POLICIES AND PROCEDURES OF THE UNIVERSITY OF PENNSYLVANIA* (2006), [http://www.upenn.edu/assoc-provost/handbook/ii\\_a.html](http://www.upenn.edu/assoc-provost/handbook/ii_a.html) [hereinafter UNIV. OF PA., *HANDBOOK*].

tional policies and procedures as set forth in the research policies of the University. . . .

The teacher is entitled to freedom in the classroom in discussing his or her subject.<sup>71</sup>

Crucially for our purposes, the policy then adds, in apparently non-mandatory language,<sup>72</sup> that “the teacher should remember that the public may judge the profession and the institution by his or her utterances. Hence, the teacher should at all times show respect for the opinions of others, and should indicate when he or she is not speaking for the institution.”<sup>73</sup>

Similar sentiments are expressed by other private<sup>74</sup> as well as public<sup>75</sup> universities, by universities not subject to United States constitutional or statutory law,<sup>76</sup> by international instrument,<sup>77</sup> and by

71. *Id.*

72. Many discussions of academic freedom and its responsibilities rely on both mandatory or prohibitory language and on language that is apparently more aspirational or merely precatory and apparently less formally enforceable, if enforceable at all.

73. UNIV. OF PA., HANDBOOK, *supra* note 70.

74. See, e.g., STANFORD UNIV., RESEARCH POLICY HANDBOOK (1998), [http://www.stanford.edu/dept/DoR/rph/rph\\_pdf/2-3.pdf](http://www.stanford.edu/dept/DoR/rph/rph_pdf/2-3.pdf) (“Stanford University’s central functions of teaching, learning, research, and scholarship depend upon an atmosphere in which freedom of inquiry, thought, expression, publication, and peaceable assembly are given the fullest protection.”).

75. See, e.g., Univ. of Ca., General University Policy Regarding Academic Appointees: Academic Freedom (Sept. 29, 2003), <http://www.ucop.edu/acadadv/acadpers/apm/apm-010.pdf> (“The University of California is committed to upholding and preserving principles of academic freedom. These principles reflect the University’s fundamental mission, which is to discover knowledge and to disseminate it to students and to society at large.”). This of course is not to suggest in the slightest that the leading universities have invariably followed their own basic logic in matters of academic freedom.

76. See, e.g., University of Toronto, Statements of Institutional Purpose: Purpose of the University (Oct. 15, 1992), [http://www.utoronto.ca/govcncl/pap/policies/mission.html#\\_Toc468159531](http://www.utoronto.ca/govcncl/pap/policies/mission.html#_Toc468159531) (“Within the unique university context, the most crucial of all human rights are the rights of freedom of speech, academic freedom, and freedom of research. And we affirm that these rights are meaningless unless they entail the right to raise deeply disturbing questions and provocative challenges to the cherished beliefs of society at large and of the university itself.”). Actually, it is far from clear what is to be gained, apart perhaps from some emotive force, from characterizing academic freedom as a “human right.” To be an academic is to occupy a narrowly specialized and distinctive niche among all forms of gainful employment. Academic freedom presupposes complex institutional roles and responsibilities, such that it would be more misleading than illuminating to say that a given academic is entitled to academic freedom simply, or even primarily, in virtue merely of being a sentient, aspiring human. Nor does it seem advisable, as the University of Toronto formulation appears to do, to distinguish academic freedom in this context from the academic’s “freedom of research.” See *id.*

77. See, e.g., REPORT OF THE FIRST GLOBAL COLLOQUIUM OF UNIVERSITY PRESIDENTS: STATEMENT ON ACADEMIC FREEDOM art. I–III (Michael W. Doyle et al. ed., 2005), <http://www.columbia.edu/cu/president/communications%20files/globalcolloquium>

scholars of the university itself.<sup>78</sup> Cumulatively, it becomes clear that the consensus holds that the mission or basic purposes of the university are, in one way or another, inseparable from or crucially dependent upon familiar formulations of the idea of academic freedom.

### C. Individual and Institutional Academic Freedom

A fundamental ambiguity that must be addressed in substantive terms, however, is between the academic freedom of individuals or groups of academics on the one hand, and, on the other, the academic freedom of the university itself, as a collective institution, chiefly spoken for by the university administration and the university's board of governors or trustees. Classic statements by particular Justices on academic freedom have sometimes focused entirely on the latter institutional sense. Justice Powell's crucial opinion in *Bakke*,<sup>79</sup> for example, focused on academic freedom in the sense of the university's freedom to decide "who may teach, what may be taught, how it shall be taught, and who may be admitted to study."<sup>80</sup>

While the courts sometimes minimize the former, individualized sense of academic freedom at the expense of the latter, institutional

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.htm (discussing a 1950 UNESCO statement at Nice, France, which upheld "[t]he right to pursue knowledge for its own sake and to follow wherever the truth may lead," despite inserting a concomitant responsibility of some sort on the part of scholars and teachers to "resist corrupting influences" and to "transcend partisanship and prejudice").

78. See, e.g., JAROSLAV PELIKAN, *THE IDEA OF THE UNIVERSITY: A RE-EXAMINATION* 48 (1992) (stating that "[f]reedom of inquiry is an intellectual value upon which the life of the university as a center of research and teaching depends," even under political regimes that neither recognize nor respect anything like our familiar free speech law under the First Amendment, in the course of referring to the university's "two fundamental intellectual virtues" as "free inquiry and intellectual honesty"). Substantial genuine freedom of inquiry may well encourage intellectual honesty, and if intellectual honesty diminishes, the realistic practical value of any associated of freedom of inquiry may tend to decrease as well. Again, enforcing freedom of inquiry will always face subtle obstacles, but attempting to enforce intellectual honesty, even if a university were so disposed, seems even more inherently unmanageable. See ROBERT PAUL WOLFF, *THE IDEAL OF THE UNIVERSITY* 131 (1969) (holding the ideal university's purpose to be "the preservation and advancement of learning and the pursuit of truth in an atmosphere of freedom and mutual respect, in which the intellectual freedoms of teaching, expression, research, and debate are guaranteed absolutely"); Robert M. Hutchins, *The Higher Learning in America*, 4 J. HIGHER EDUC. 1, 1 (1933) (private and public universities as struggling to "maintain the right of the scholar to exercise his intelligence even though it led him to criticize established policies or institutions").

79. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) (quoting the classic formulation of Justice Frankfurter's concurring opinion in *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957)).

80. *Id.*

autonomy form,<sup>81</sup> we have herein been in the process of developing the logic of protecting the more individualized sort of academic freedom as well.<sup>82</sup> Certainly the Supreme Court has at least on occasion seemed open to the meaningfulness of both forms of academic freedom. The Court has, for example, recognized that "[a]cademic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also, and somewhat inconsistently, on autonomous decisionmaking by the academy itself."<sup>83</sup>

Both sorts of academic freedom must be recognized<sup>84</sup> and accorded their proper places. There may certainly be conflicts, for example, between individual professional academic freedom and the power and authority of a university administration to set academic standards, broadly understood, in various respects.<sup>85</sup> By contrast, the academic freedom of individual professors and of the university as a whole might also be threatened simultaneously, if to different degrees.<sup>86</sup> Forces of one sort or another external to the university<sup>87</sup> may ally

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81. See, for example, the cases cited *supra* notes 14, 18.

82. See generally Parts II–III.

83. *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 n.12 (1985), *quoted in* *Bd. of Regents v. Southworth*, 529 U.S. 217, 237 (2000) (Souter, J., concurring); *Brown v. Li*, 308 F.3d 939, 951 (9th Cir. 2002) (failure to approve "Disacknowledgements" section of student thesis); *Edwards v. Cal. Univ.*, 156 F.3d 488, 492 (3d Cir. 1998) (university control over professor's curriculum and course materials).

84. See, e.g., *Piarowski v. Ill. Cmty. Coll. Dist.*, 759 F.2d 625, 629 (7th Cir. 1985) (noting "both the freedom of the academy . . . and the freedom of the individual teacher"); Hamlyn, *supra* note 63, at 207 ("Let me start with academic freedom. It is important here whether one is concerned with the institution or with the individual member of it."); David M. Rabban, *Functional Analysis of 'Individual' and 'Institutional' Academic Freedom Under the First Amendment*, 53 *LAW & CONTEMP. PROBS.* 227 (1990). But cf. WOLFF, *supra* note 78, at 107 ("Presidents and trustees never hesitate to speak and act in the name of their universities, but it is hard to see what right they have to do so."). For judicial recognition in dicta of the individual form of academic freedom in the law school setting, see *Blum v. Schlegel*, 18 F.3d 1005, 1011 (2d Cir. 1994) ("To fulfill these many roles, law schools promote an environment characterized by the active exercise of First Amendment rights. Indeed, free and open debate on issues of public concern are essential to a law school's function."). Generally, academic freedom only very partially overlaps with, and must not be confined to, issues of public concern. See *infra* notes 166–69 and accompanying text.

85. See, e.g., *Edwards*, 156 F.3d at 492.

86. See, e.g., *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967) (New York state statute and regulations barring public school employment to anyone teaching the seditious or forcible overthrow of government as unconstitutionally vague and violative of the First Amendment).

87. Such external forces could potentially include, at a minimum, any branch and level of state or federal government, corporations and employers, funding agencies, foundations, accrediting agencies, donors and alumni, educational and more broadly political interest groups, any form of media, and religious denominational organizations and interest groups. Presumably, any external person or group issuing any threat beyond the influence of sheer persuasive argument in some appropriate channel or forum could potentially qualify.

themselves with either individual professors or with the university administration in opposition to the academic freedom of the other. Often, an externally imposed limit on either form of academic freedom will tend to indirectly jeopardize the other form, to some degree, as well.<sup>88</sup> But there are also interventions, directed at the university administration, that are intended precisely to limit the university's ability to restrict individual academic freedom.<sup>89</sup>

#### D. Religious Private University Missions and Academic Freedom

The potential for conflict between academic freedom of individual faculty and academic freedom as autonomous pursuit of university mission is particularly clear in the subset of private universities with religious affiliations and distinctive religiously influenced missions. Such institutions are not all alike with respect to individual academic freedom. But we can imagine that at least some schools with religious doctrinal missions may be particularly skeptical of employing faculty who "ride with the cops and cheer[ ] for the robbers,"<sup>90</sup> as the school defines those roles. Or at least, that some such schools may wish to retain some designated critical percentage of faculty deemed supportive of the university's religious mission.<sup>91</sup>

Some religious schools seem keenly aware of some of the difficulties they face in reconciling fidelity to mission with academic free-

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88. See, e.g., *Keyishian*, 385 U.S. at 592 (involving state law that imposed binding substantive limits or requirements on what public university teachers in particular could believe and teach). Any such restriction is presumably a limitation to some degree on university autonomy as well as on individual faculty members.

89. Thus, an action pursuant to 42 U.S.C. § 1983 might involve an individual professor's recourse to a federal statute to prevent action under color of state law that would be allegedly violative of the plaintiffs' First and Fourteenth Amendment free speech rights. See, e.g., *Power v. Summers*, 226 F.3d 815, 820–21 (7th Cir. 2000) (Posner, J.) (alleged denial of pay raise for several faculty at public two-year college allegedly based on plaintiffs' critical speech). And while whistleblower statutes are not generally designed to protect individual academic freedom, there may be some occasional overlap between the two interests. See Marni M. Zack, Note, *Public Employee Free Speech: The Policy Reasons For Rejecting a Per Se Rule Precluding Free Speech Rights*, 46 B.C. L. REV. 893, 916–17 (2005).

90. *Rankin v. McPherson*, 483 U.S. 378, 394 (1987) (Scalia, J., dissenting).

91. The faculty percentage deemed critical might range from 50% to 100%. See, e.g., Alan Jacobs, *To Be a Christian College*, FIRST THINGS, Apr. 2006, at 17, 17–20, available at <http://www.firstthings.com/ftissues/ft0604/articles/jacobs.html>; Apostolic Constitution of the Supreme Pontiff John Paul II on Catholic Universities (Aug. 15, 1990), [http://www.brescia.uwo.ca/about/governmance/policies/ex\\_corde\\_ecclesiae.pdf](http://www.brescia.uwo.ca/about/governmance/policies/ex_corde_ecclesiae.pdf). For a critique of the latter, see Daniel C. Maguire, *Academic Freedom and the Vatican's Ex Corde Ecclesiae*, ACADEME, May–June 2002, at 46, 46–50, available at <http://www.aaup.org/publications/Academe/200202mj/02mjmag.htm>.



dom.<sup>92</sup> The very possibility of a sustained reconciliation of one sort or another of a distinctive faith mission commitment with individual academic freedom is contestable.<sup>93</sup> There are no shortcuts to resolving such issues, in particular cases or in the abstract. Universities with distinctive religious missions can as institutions add to the range and diversity of thinking and of background assumptions among the set of all universities. They can raise distinctive intellectual considerations, or at least emphasize what is elsewhere relatively neglected.

On the other side of the balance sheet, inevitably, any ways in which individual academic freedom may be distinctively impaired at such institutions must be entered. These would include any distinctive pressure toward orthodoxy exerted by any means extending beyond dialogic persuasion into the realm of significant threats. A religious school might in some respects add to diversity of thought among educational institutions in general while simultaneously restricting diversity of belief and expression on its own campus.

Inescapably, in striking the balance on academic freedom in such cases, we must, at some point, assess as well the merit or value of the beliefs that may be either required or prohibited on a given campus. Freedom, and certainly both freedom of speech in general and academic freedom in particular, cannot be reduced entirely to the mere

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92. Consider the debate on the Notre Dame campus, as documented in M. Cathleen Kaveny, *The Perfect Storm*, AMERICA, May 8, 2006, at 14 (distinguishing a “current of openness,” a “current of identity,” and an incipient “current of engagement” that would seek to avoid either “assimilation” or “isolation”); John I. Jenkins, President, Univ. of Notre Dame, Address to the Faculty, Academic Freedom and Catholic Character: An Invitation to Reflection and Response (Jan. 23, 2006), available at [http://president.nd.edu/academic-freedom/address\\_text.shtml](http://president.nd.edu/academic-freedom/address_text.shtml); University of Notre Dame, Common Proposal of Chairs of the College of Arts and Letters and Fr. Jenkins, <http://president.nd.edu/closingstatement/commonproposal> (last visited Apr. 8, 2006).

93. Compare, e.g., WOLFF, *supra* note 78, at 129 (stating that by some interpretations, “the phrase ‘Catholic University’ is a strict contradiction in terms,” with the contradiction lying not in religious devoutness, but in any surrender by a purported member of the community of learning of their ultimate autonomy or reservation of judgment on matters of doctrine), with Statement on Academic Freedom at BYU, <http://fc.byu.edu/tpages/tchlrn/acadfree.html> (last visited June 19, 2006) (maintaining that the BYU approach to religion and academic freedom involves not “narrowing the scope of freedom but . . . enabling greater (or at least different) and much prized freedoms”). See Michael W. McConnell, *Academic Freedom in Religious Colleges and Universities*, 53 LAW & CONTEMP. PROBS. 303, 304 (1990) (“To impose the secular norm of academic freedom on unwilling religious colleges and universities would increase the homogeneity—and decrease the vitality—of American intellectual life.”); George M. Marsden, *Liberating Academic Freedom*, FIRST THINGS, Dec. 1993, at 11, 11–14, available at <http://www.leaderu.com/ftissues/ft9812/opinion/marsden.html>; James Neuchterlein, *The Idol of Academic Freedom*, FIRST THINGS, Dec. 1993, at 12, 12–16, available at <http://www.leaderu.com/ftissues/ft9312/articles/nuechterlein.html>; Alan Finder, *Feeling Strains, Baptist College Cut Church Ties*, N.Y. TIMES, July 22, 2006, at A1.

number of things one can do or say.<sup>94</sup> Value assessments must enter in as well.<sup>95</sup> Some matters are understood to be more important than others.<sup>96</sup> Some religiously motivated beliefs cannot add enough value in terms of diversity of thought to make up for the broadly recognized disvalue of the ways in which they rend the social fabric in a pluralistic society, apart from the costs in individual academic freedom they may impose.<sup>97</sup> Classically, a religiously motivated institutional belief, translated into school policy, may fall afoul of basic federal civil rights legislation and be unworthy of protection for that reason.<sup>98</sup>

Diversity, or diversification, of thought and belief is clearly related to freedom of speech and to the basic values underlying free speech.<sup>99</sup> But part of the value of diversity in general in many contexts, not limited to investments<sup>100</sup> or environmental health,<sup>101</sup> is in reducing the risks of genuinely bad outcomes.<sup>102</sup> A school that cites its own institutional academic freedom, or the value of diversity, in defense of what is widely deemed, even at law, already a genuinely bad outcome, has not thereby raised a persuasive claim. There must at some point come a limit to our collective self-restraint and deference to an institution born of our sense of our own collective biases and fallibility. At that point, there must arise a willingness to defend crucial rights and values jeopardized by institutional academic freedom in a particular university context.

## E. Free Speech Values and Academic Freedom

To better understand the nature and value of academic freedom in various contexts, we must briefly link the idea of academic freedom to

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94. See, e.g., MATTHEW H. KRAMER, *THE QUALITY OF FREEDOM* 387 (2003); CHRISTINE SWANTON, *FREEDOM: A COHERENCE THEORY* 190 (1992).

95. See *supra* note 94.

96. A faculty member's ability to speak freely or within limits on admissions and civil rights at a religious institution, or freely on the content of the academic subject for which the faculty member was hired and holds recognized special expertise, is generally more significant to academic freedom than the freedom to dilate on scarce or inconvenient parking or dining accommodations, for example.

97. This, again, is not to pretend that academic freedom at a distinctive religious institution, or the academic diversity that is added by that institution, can be neatly quantified and commensurated. See *supra* note 94. But not all non-quantified judgments among incommensurable choices need be subjective and arbitrary.

98. See *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) (involving denial of tax-exempt status to racially discriminatory institution).

99. See, e.g., JOHN STUART MILL, *ON LIBERTY* 108, 121 (Gertrude Himmelfarb ed., Penguin Books 1974) (1859).

100. See, e.g., R. George Wright, *Dominance and Diversity: A Risk-Reduction Approach to Free Speech Law*, 34 VAL. U. L. REV. 1, 14-16 (1999).

101. See, e.g., *Nat'l Ass'n of Home-Builders v. Babbitt*, 130 F.3d 1041, 1053, 1059 (D.C. Cir. 1997) (Henderson, J., concurring); Wright, *supra* note 100, at 17-20.

102. See, e.g., Wright, *supra* note 100, at 9-10.

two of the standardly recognized basic purposes or values underlying the idea of special constitutional protection for speech. In particular, we should focus on the linkages between academic freedom and the free speech values of the pursuit of truth and of collective self-development. Both of these free speech values have already been met above as goals practically inseparable from the effective execution of central elements of the university mission.<sup>103</sup>

That the free speech values of the pursuit of truth and of collective self-development support academic freedom, even apart from the mission and policy statements cited above, should not be surprising. Some years ago, for example, Robert M. Hutchins declared broadly that "[t]he arguments for academic freedom are the same as those for freedom of speech."<sup>104</sup> Such arguments are in a way actually somewhat misleading. Freedom of speech shields everyone against certain forms of government interference, but academic freedom makes policy sense in only a specialized set of circumstances. But there is certainly much to Hutchins' argument.

The pursuit of truth as a crucial value not only to the university but also to freedom of speech has been classically defended by John Stuart Mill.<sup>105</sup> This defense does not rely on any assumption that an unpopular speaker is likely to be right and the regulating authority wrong.<sup>106</sup> Academic freedom similarly does not stand or fall on anyone's view of the truth or falsity of a contested claim made by the academic figure in question. The logic of academic freedom, given the

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103. See *supra* notes 51–78 and accompanying text. Professor Robert Post has argued that

justifications for academic freedom do [not] rest on individual autonomy or democracy or the marketplace of ideas [or the advancement of knowledge], but instead on a particular idea of the institutional mission of a University. Academic freedom creates protections that are grounded in a view of the purposes of a university.

Robert Post, Address to the Academic Freedom Forum, Academic Freedom: Its History and Evolution Within the UC System 1 (June 11, 2003), available at <http://www.universityofcalifornia.edu/senate/committees/ucaff/afforum/post.pdf>. Professor Post essentially equates "the advancement of knowledge" and "the marketplace of ideas" in his statement. There seems to be no sufficient justification, however, for this sharp distinction between free speech values and the mission of a university. As we shall continue to see, they seem practically inseparable, at least if the university mission is to be effectively pursued.

104. Robert M. Hutchins, *The Meaning and Significance of Academic Freedom*, 300 ANNALS AM. ACAD. POL. & SOC. SCI. 72, 72 (1955) (citing MILL, *supra* note 99).

105. See MILL, *supra* note 99, at 76–77; THOMAS JEFFERSON, 1818 REPORT FOR THE UNIVERSITY OF VIRGINIA, reprinted in THOMAS JEFFERSON, WRITINGS 459–60 (Merrill D. Peterson ed., Library of Am. 1984); Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119, 130–33 (1989); see generally William P. Marshall, *In Defense of the Search for Truth as a First Amendment Justification*, 30 GA. L. REV. 1 (1995).

106. See, for example, the excerpt from John Stuart Mill in Hutchins, *supra* note 104, at 72.

university mission of furthering the truth, does require, however, that academics be generally selected in the first place in part based on their distinctive subject matter expertise. There would be little point in the Harvard motto of "Veritas"<sup>107</sup> if the Harvard faculty were generally no more capable of approaching truth in any given field than the untrained.<sup>108</sup>

The dramatic battles between unorthodox truth-seekers and various forces of repression, however well or ill motivated, have always been of interest.<sup>109</sup> The pursuit of truth, however haltingly undertaken, will doubtless remain central to the broad university mission. Admittedly, the very idea of truth itself has experienced something of a downsizing of late in some academic circles. "Truth" in certain realms has been discussed under rubrics including skepticism, incredulity before metanarratives, fictionalism, minimalism, deflationism, constructivism, conventionalism, nihilism, extreme contextualism, nominalism, subjectivism, noncognitivism, expressivism, quasi-realism, irrealism, anti-realism, projectivism, emotivism, relativism, and error theory.<sup>110</sup>

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107. For background, see Arthur J. Langguth, *Nothing But the Truth*, HARV. CRIMSON ONLINE, Oct. 6, 1953, <http://www.thecrimson.harvard.edu/article.aspx?ref=209484>.

108. While academic freedom also extends beyond statements within the individual's area of special expertise, as on political matters addressed in a broader public forum, it is important not to seek to confine academic freedom to matters of subjective interest to the general public. See *infra* notes 166–69 and accompanying text.

109. See, e.g., *Kay v. Bd. of Higher Educ.*, 18 N.Y.S.2d 821 (Sup. Ct.) (preventing Bertrand Russell from teaching at City College of New York due to alleged sexual immorality and controversial views on premarital sex and other moral issues), *aff'd mem.*, 20 N.Y.S.2d 1016 (App. Div. 1940); THE BERTRAND RUSSELL CASE (John Dewey & Horace M. Kallen ed., De Capo Press 1972) (1941) (discussing Russell's case); THOMAS C. BRICKHOUSE & NICHOLAS D. SMITH, SOCRATES ON TRIAL 197–200 (1989) (noting that Socrates himself rejected legal or other interference with his teaching, but did not himself feel subjectively free in teaching, as opposed to acting pursuant to divine command); THE GALILEO AFFAIR: A DOCUMENTARY HISTORY 287–91 (Maurice A. Finocchiaro ed. & trans., 1989) (describing Galileo's "Sentence (22 June 1633)"); JEROME LAWRENCE & ROBERT E. LEE, INHERIT THE WIND 72 (Random House 2003) (1955) ("[H]e is threatened with fine and imprisonment because he chooses to speak what he thinks . . ."); PLATO, *The Apology*, in FIVE DIALOGUES: EUTHYPHRO, APOLOGY, CRITO, MENO, PHAEDO (G.M.A. Grube trans., Hackett 2002); C.D.C. REEVE, SOCRATES IN THE APOLOGY 123 (1989) (discussing Socrates as teacher); Pope John Paul II, Discourse at the Plenary Academic Session, On the Centenary of the Birth of Albert Einstein para. 6 (Nov. 10, 1979), available at <http://www.ewtn.com/library/PAPALDOC/JP2A/LEIN.HTM>.

110. For discussion, see Ronald Dworkin, *We Need A New Interpretation of Academic Freedom*, in THE FUTURE OF ACADEMIC FREEDOM 181, 183 (Louis Menard ed., 1996); Thomas L. Haskell, *Justifying the Rights of Academic Freedom in the Era of "Power/Knowledge,"* in THE FUTURE OF ACADEMIC FREEDOM, *supra*, at 43, 72–73; Larry Alexander, *Academic Freedom*, 77 U. COLO. L. REV. 883 (2006);

But these trends, singly or together, do not immediately threaten to undermine university missions or the pursuit of truth as underpinning free speech and academic freedom in particular. The idea of truth as somehow reducible to political power, for one, has been familiar for several thousand years.<sup>111</sup> Yet the tax- and tuition-paying public seems in no hurry, at least on that basis, either to judge truth to no longer be worth the cost of tuition or else to displace the views of professors generally with their own preferred views. We see contemporary attacks on academic freedom, but rarely on the grounds that the attenuation of the idea of truth in the academy legitimizes such an attack.

The continuing stability of academic freedom in general may in part reflect the range of academics, including architects and engineers, for whom it is commonly true that the bridge stands, or it is true that the bridge collapses, with few subtleties.<sup>112</sup> It is also perhaps partly a matter of the second linkage among university missions, free speech values other than the pursuit of truth, and the case for protected academic freedom.

This refers in particular to the second of the relevant basic free speech values, that of collective self-realization and development.<sup>113</sup> Here again, we see a near identity between, on the one hand, how the university, in large part through academic freedom,<sup>114</sup> seeks to con-

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David M. Rabban, *Can Academic Freedom Survive Postmodernism*, 86 CAL. L. REV. 1377 (1998) (reviewing THE FUTURE OF ACADEMIC FREEDOM, *supra*); and Steven D. Smith, *Skepticism, Tolerance, and Truth in the Theory of Free Expression*, 60 S. CAL. L. REV. 649 (1986). For brief defining entries of these varied, partially overlapping, partially contradictory terms operating at different levels, see, for example, SIMON BLACKBURN, OXFORD DICTIONARY OF PHILOSOPHY (2d ed. 2005).

111. Consider that rhetoricians such as Callicles and Thrasymachus, whatever their roles in Socrates' fate, seem not to have permanently undermined the case for academic freedom in the minds of the public. See PLATO, GORGIAS 50–52 (W. Helmholtz trans., 1952); THE REPUBLIC OF PLATO 15–21 (Francis M. Cornford trans., 1945).
112. But for some hazy alternatives not necessarily downsizing the idea of truth, see, for example, THE GHOST IN THE ATOM: A DISCUSSION OF THE MYSTERIES OF QUANTUM PHYSICS (P.C.W. Davies & Julian R. Brown eds., Cambridge Univ. Press 1993) (1986); Guido Bacciagaluppi, *The Role of Decoherence in Quantum Mechanics*, STAN. ENCYCLOPEDIA PHIL., Summer 2005, <http://plato.stanford.edu/archives/sum2005/entries/qm-decoherence/>.
113. See generally, e.g., Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982); Brian C. Murchison, *Speech and the Self-Realization Value*, 33 HARV. C.R.-C.L. L. REV. 443 (1998). Classically, see MILL, *supra* note 99, at 95–97, 121–23, where Mill emphasizes the effects of free speech on cultural development as well as on individuals, and on collective progress as well as on individual autonomy.
114. This is not to suggest that literally everyone's flourishing in every sense depends upon vigorous university academic freedom or on freedom of speech in general. The occasional martyr, civil rights leader, revolutionary, and perhaps even the

tribute to cultural development,<sup>115</sup> and, on the other, how freedom of speech in general is valued in part for just such reasons.<sup>116</sup> John Stuart Mill's progressive defense of free speech, for example, led him so far as to hold that "the men and women who at present inhabit the more civilized parts of the world . . . assuredly are but starved specimens of what nature can and will produce."<sup>117</sup>

Focusing on the values of the pursuit of truth and of collective self-realization and development thus clarifies the linkages among the purposes of a university, academic freedom, and the protection worthiness of some speech under the First Amendment. But not all speech is constitutionally protected,<sup>118</sup> and not all speech uttered in some education-related context qualifies as academic speech deserving protection under the distinctive rubric of academic freedom.

What kind of speech, then, in what circumstances, amounts to the exercise of academic freedom qualifying for constitutional free speech protection? We will see below how the courts have mishandled such inquiries, typically through reliance on inappropriate tests.<sup>119</sup> The scope of constitutional free speech protection properly accorded academic freedom is instead better informed by recourse to the logic of university missions, university values, and the basic justifications for academic freedom and for free speech in general.

Paying more direct attention to the crucial values promoted by the university and by academic freedom would allow the courts to improve over the current results of applying inappropriate tests drawn from distant contexts. But there will remain some inescapable vagueness in this area of the case law. There are no sharp boundaries and no readily detectable "tipping points"<sup>120</sup> at which academic freedom dramatically springs into being as a constitutional consideration.

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occasional artist, may pose exceptions to the general rule. See, e.g., ELIZABETH WILSON, *SHOSTAKOVICH: A LIFE REMEMBERED* (1994).

115. See, for example, the selected university mission and value statements referred to *supra* notes 51–56, 59 and accompanying text.

116. See MILL, *supra* note 99, at 95–97, 121–23.

117. *Id.* at 72. The cultural development argument for freedom of speech, let alone for academic freedom, does not depend upon Mill's Victorian assumptions as to hierarchical cultural rankings.

118. See, e.g., *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1959–60 (2006) (deputy district attorney's speech unprotected because it was pursuant to official duties as an employee, rather than as a citizen on matters of personal interest); *Connick v. Myers*, 461 U.S. 138, 146–48 (1983) (assistant district attorney's criticisms of employer found to be mainly on matters of personal interest, as an employee, rather than speech as a citizen on matters of public interest and concern, given the content, form, and context of her speech, and thus worthy of only the most minimal protection).

119. See *infra* Part III.

120. For a popular current discussion, see MALCOLM GLADWELL, *THE TIPPING POINT: HOW LITTLE THINGS CAN MAKE A BIG DIFFERENCE* (Little, Brown & Comp. 2002).

Instead, we might think of protection-worthy academic freedom as an entirely real and distinctive but “emergent” phenomenon. In the simple sense in which we are interested in the term, an “emergent” phenomenon, in this case academic freedom worthy of distinctive free speech protection, is one with characteristics that transcend and are not inferrable from or reducible to the properties of the elements that have been combined to constitute the emergent phenomenon.<sup>121</sup>

In our context, we might start with the reasonable assumption that freedom of speech is, as a matter of fairness and equality, protectable for all those capable of asserting it. But are distinctive contexts, special circumstances, social roles, and unique social functions of no consequence in this regard? The university emerges in particular circumstances with certain distinct roles and purposes. Just as salt “emerges from” but does not share all the properties of sodium and chlorine, so the university emerges in a certain educational and technical context, but is not reducible to its context or to other institutions.

We thus cannot say, for example, that Cambridge University and the typical elementary school share precisely the same mission<sup>122</sup> and values. Nor could we say that Stephen Hawking, an admittedly exceptional Cambridge professor<sup>123</sup> engaged in research on the frontier of cosmology,<sup>124</sup> is doing essentially the same thing as any public elementary school teacher. Nor are the university research professor and, say, the government-employed spy themselves relevantly similarly situated for free speech purposes.<sup>125</sup>

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For more classic treatment, see THOMAS C. SCHELLING, *MICROMOTIVES AND MACROBEHAVIOR* 99, 101–02 (1978).

121. For a brief survey of several versions of the idea, see Timothy O'Connor & Hong Yu Wong, *Emergent Properties*, in *STANFORD ENCYCLOPEDIA OF PHIL.*, Sept. 24, 2004, <http://plato.stanford.edu/entries/properties-emergent/>. See also PHILIP CLAYTON, *MIND AND EMERGENCE*, at vi (2004) (“Emergence is the view that new and unpredictable phenomena are naturally produced by interactions in nature; that these new structures, organisms, and ideas are not reducible to the subsystems on which they depend; and that the newly evolved realities in turn exercise a causal influence on the parts out of which they arose.”); Timothy O'Connor, *Emergent Properties*, 31 *AM. PHIL. Q.* 91, 91 (1994) (attempting to “clarify . . . discussion of “emergent hypotheses” (citing JOHN STUART MILL, *A SYSTEM OF LOGIC* bk. III, ch. 6, § 1)).
122. See *supra* notes 51–55 and accompanying text (elucidating the mission and values of Cambridge University). See also Vikram Amar & Alan Brownstein, *Academic Freedom*, 9 *GREEN BAG 2D* 17, 23 (2005) (“In elementary, junior high and high schools, we think the argument for protecting the academic freedom of teachers is largely unpersuasive. The academic role here has little to do with research, the development of new knowledge, or freewheeling inquiry . . .”).
123. For a biography, see JOHN BOSLOUGH, *STEPHEN HAWKING'S UNIVERSE* (1989).
124. See, e.g., STEPHEN W. HAWKING, *THE THEORY OF EVERYTHING* (New Millenium Press 2002).
125. See, e.g., *Snepp v. United States*, 444 U.S. 507, 511–13 (1980) (enforceability of CIA agent's employment agreement for judicially reviewable pre-publication clearance by agency of any agency-related material for possible national security

The CIA agent, the welfare worker, the third-grade teacher, and the public university cosmologist all work for the government and all equally deserve appropriate free speech protection. But the nature and extent of that protection should reflect relevant differences in the missions of their institutions, in the nature of their work, and in their specific training and circumstances.

Some courts seem to rightly appreciate that recognizing academic freedom as a distinctive component of free speech law reflects these relevant differences, rather than mere rent seeking or some sort of elitist grasping for arbitrary privilege. This recognition may be at work in the university tenure denial case of *Allworth v. Howard University*.<sup>126</sup> The *Allworth* court recognized “the university context”<sup>127</sup> as one “where concepts of academic freedom and academic judgment are so important that courts generally give deference to the discretion exercised by university officials.”<sup>128</sup> A bit more specifically, the court then emphasized judicial restraint “in such sensitive areas as faculty appointment, promotion, and tenure, especially in institutions of higher learning.”<sup>129</sup> The court here at least recognizes relevant differences between institutions of higher learning, including universities, and other broadly educational institutions.<sup>130</sup>

We next turn in the following Part to a more detailed examination of the free speech tests the courts have borrowed from other contexts and applied, without modification and often inappropriately, in university contexts. Such contexts often logically require recognition of constitutionally enforceable academic freedom. At this point, we

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implications). *Snapp* is distinguished, partly in light of the absence of national security considerations, in the case of *Harman v. City of New York*, 140 F.3d 111 (2d Cir. 1998), which dealt with preauthorization for welfare workers’ public interviews.

126. 890 A.2d 194 (D.C. 2006).

127. *Id.* at 202.

128. *Id.*

129. *Id.* (quoting *Brown v. George Washington Univ.*, 802 A.2d 382, 385 (D.C. 2002)). Of course, the *Allworth* context involved collective or university administrative autonomy rather than the academic freedom of an individual professor, as did the quoted *Brown*. See also *Bd. of Curators v. Horowitz*, 435 U.S. 78, 90 (1978) (stating that “a hearing may be ‘useless or harmful in finding out the truth as to scholarship’” (quoting *Barnard v. Inhabitants of Shelburne*, 102 N.E. 1095, 1097 (Mass. 1913))).

130. By contrast, consider the failure to recognize public university professors’ research as relevantly different from other loosely similar sorts of government workplace activity, with the resulting concern for special privileging, elitism, and anti-egalitarianism in the area of free speech rights, in *Schrier v. University of Colorado*, 427 F.3d 1250, 1266 (10th Cir. 2005) (academic freedom as amounting to a “special constitutional right . . . not enjoyed by other governmental employees” presumed to be “similarly situated”); and *Urofsky v. Gilmore*, 216 F.3d 401, 411 n.13 (4th Cir. 2000) (referring to “the specter of a constitutional right enjoyed by only a limited class of citizens”).



should simply appreciate that proper recognition of academic freedom does not, as a matter of arbitrary favoritism, confer special constitutional rights, either beyond or within the free speech right, on some privileged class.

Academic freedom in this context is a matter of how institutions, their missions, and distinctive academic roles and training properly make a difference in the scope of First Amendment protection. Public employee work roles can and do make a difference. We do not view nonconfidential or nonpolicymaking governmental employees as having special constitutional rights not available to other governmental employees, even though their rights of political speech and affiliation are clearly protected in some ways not available to other governmental employees.<sup>131</sup> Instead, we recognize that confidential and nonconfidential government employees may not always be similarly situated for free speech purposes.<sup>132</sup> Academic freedom, by analogy, depends upon real and relevant differences among government employees.

### III. THE CURRENT FREE SPEECH TESTS AS POORLY ADAPTED TO THE LOGIC OF CONSTITUTIONAL ACADEMIC FREEDOM

Despite decades of litigation, the courts have yet to converge on any particular approach to the free speech rights in various contexts of teachers in public institutions. There are several main variations, but none seems reasonably sensitive to the logic of university mission, university values, and the role of specialized and trained individual faculty within that context. We have seen that the most commonly applied tests are variations of one sort or another of what we have called the *Hazelwood* test<sup>133</sup> and the *Pickering-Connick-Garcetti* or *PCG* test.<sup>134</sup>

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131. See the patronage employment trilogy of *Elrod v. Burns*, 427 U.S. 327 (1976); *Branti v. Finkel*, 445 U.S. 507 (1980); and *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990).

132. Nor do we seem troubled by any claim that welfare workers or teachers and professors seem to have greater, special, or unequal rights to publicize their thoughts by comparison with CIA agents. See *supra* note 125. Presumably this reflects differences in their overall circumstances and contexts, not favoritism or special and unequal rights. Likewise, we seem to be in no hurry to conclude that the misleading speech of political candidates should be subject to government regulation even remotely akin to the regulatory penalties that may be imposed upon equally misleading commercial speakers. See, e.g., R.H. Coase, *Advertising and Free Speech*, 6 J. LEGAL STUD. 1, 2 (1977).

133. See *supra* notes 23–28 and accompanying text.

134. See *supra* notes 29–40 and accompanying text. For an explanation of the circuit split confined merely to the choice between *Hazelwood* and *PCG*, see *Chiras v. Miller*, 432 F.3d 606, 617 n.29 (5th Cir. 2005) (providing cases).

The authorization for applying the *Hazelwood* student-speech test<sup>135</sup> to some instances of teacher speech stems from dicta in *Hazelwood* itself, where the Court declared that schools may impose reasonable restrictions on teacher speech when it occurs in a nonpublic forum<sup>136</sup> and bears the arguable approval of the school itself.<sup>137</sup> The standard in such cases thus becomes whether the regulation of teacher speech that is thought to bear the school's imprint is "reasonably related to a legitimate pedagogical concern."<sup>138</sup>

Taken by itself, this standard, if applied to public university professors in their classroom teaching, research, or scholarly publication, would clearly allow for excessive restriction on professorial speech. Against the background of the direct contribution of academic freedom to the central mission of the university, what amounts to mere minimum scrutiny<sup>139</sup> as the test for official censorship cannot suffice. Suppose, for example, that a donor threatens to withhold a substantial gift unless an unorthodox scholar is somehow penalized. Can we say that the university's resulting penalty on that scholar is rationally related to some legitimate pedagogical interest, as in receiving the substantial gift? Clearly it is.<sup>140</sup> In fact, cultivating donors might be judged even an important educational interest, and not merely a legitimate interest. But then, equally clearly, the *Hazelwood* test thus underprotects the professorial classroom speech thought to fall within its scope.

If *Hazelwood* is to apply to any teacher speech, it is best confined to the sorts of grade-level contexts from which it arose. The age and sophistication of the students clearly make a difference in this and other free speech contexts.<sup>141</sup> With students below a certain level of age

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135. See *supra* notes 23–28 and accompanying text.

136. Distinctions among kinds of public forums, including nonpublic fora, are difficult to draw consistently. For noteworthy attempts, see *Perry Education Ass'n v. Perry Local Educator's Ass'n*, 460 U.S. 37 (1983); *Cornelius v. NAACP Legal Defense & Education Fund, Inc.*, 473 U.S. 788 (1985); and *Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666 (1998).

137. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 267 (1988), *quoted in* *Kirkland v. Northside Indep. Sch. Dist.*, 890 F.2d 794, 801 (5th Cir. 1989) (probationary school teacher's nonrenewal as allegedly based on disapproval of supplementary reading list for world history class). In *Kirkland*, the court first worked through the *Pickering-Connick* test. *Id.* at 797–99.

138. *Hazelwood*, 484 U.S. at 273, *quoted in* *Silano v. Sag Harbor Union Free Sch. Dist.*, 42 F.3d 719, 723 (2d Cir. 1994) (plaintiff "teacher" was an outside guest lecturer for tenth grade class, and thus might not have been able to trigger the *Pickering-Connick* analysis requiring a government-employee speaker).

139. See, for example, the minimum scrutiny standard applied in the equal protection context in *New York City Transit Authority v. Beazer*, 440 U.S. 568, 592–93 (1979).

140. See *id.*

141. See *Silano*, 42 F.3d at 722–23 (quoting *Ward v. Hickey*, 996 F.2d 448, 453 (1st Cir. 1993)). For general reservations as to whether *Hazelwood* should be ex-

and sophistication, there may be special difficulty in separating a teacher's classroom speech, of any sort, from speech that is taken to be somehow approved by the school.<sup>142</sup> For students beyond a certain such level, the idea that different professors may have conflicting views, and that the university may not or cannot endorse all such views on the merits, is more manageable.<sup>143</sup> The ideas of a disclaimer, or of disassociation with the views of another, by either teacher or administration, may be difficult at one level of age and sophistication, yet manageable at another.<sup>144</sup>

The *Hazelwood* test, itself a sort of minimum scrutiny test for arguably school-approved speech in nonpublic fora, is thus insufficiently protective of university professor speech. *Hazelwood* is sometimes, but hardly always, interpreted as also implicitly requiring that the restriction on speech be viewpoint neutral rather than viewpoint based.<sup>145</sup> That is, the restriction on a professor's speech even under *Hazelwood* generally could not be based on disapproval of the professor's message or viewpoint.<sup>146</sup>

However, even if we assume strict scrutiny<sup>147</sup> for viewpoint-based restrictions of professorial speech in *Hazelwood*-type circumstances, the *Hazelwood* test remains insufficiently protective of academic free-

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tended to cover public university professor speech, see, for example, *Vanderhurst v. Colorado Mountain College District*, 208 F.3d 908, 915 & 915 n.2 (10th Cir. 2000) (applying *Hazelwood* in case of junior college professor's speech, but adding that "we need not decide definitively . . . whether that framework does in fact govern a public college or university's control over the classroom speech of a professor or other instructor").

142. See *Hazelwood*, 484 U.S. at 271. For an instance of student speech in a context such that school sponsorship would simply be an unreasonable inference, see *Frederick v. Morse*, 439 F.3d 1114, 1120–21 (9th Cir. 2006).
143. For a sense of the debate over the applicability of *Hazelwood* at a college or university level, see *Hosty v. Carter*, 412 F.3d 731 (7th Cir. 2005) (en banc) (Easterbrook, J.); *Student Government Ass'n v. Board of Trustees*, 868 F.2d 473, 480 n.6 (1st Cir. 1989) (declining to apply the *Hazelwood* test in the case of a college-level newspaper); and Richard M. Goehler, *Hosty Is a "Recipe for Confusion and Conflict,"* COMM. L., Summer 2005, at 21.
144. For discussion, see Karyl Roberts Martin, Note, *Demoted to High School: Are College Students' Free Speech Rights the Same as Those of High School Students?*, 45 B.C. L. REV. 173 (2003); and Laura K. Schultz, Note, *A "Disacknowledgement" of Post-Secondary Student Free Speech—Brown v. Li and the Applicability of Hazelwood v. Kuhlmeier to the Post-Secondary Setting*, 47 ST. L. U. L.J. 1185 (2003) (discussing *Brown v. Li*, 308 F.3d 939 (9th Cir. 2002), a case concerning a free speech claim brought by a graduate student who had submitted a thesis with an arguably nonconforming "disacknowledgements" section).
145. For a lineup of the split among the federal circuits on this issue, see *Chiras v. Miller*, 432 F.3d 606, 615 n.27 (5th Cir. 2005).
146. See, e.g., *Rosenberger v. Rector*, 515 U.S. 819, 829 (1995) (discrimination against speech based on viewpoint as "an egregious form of content discrimination").
147. See, e.g., *Peck v. Baldwinville Cent. Sch. Dist.*, 426 F.3d 617, 633 n.11 (2d Cir. 2005).

dom. Viewpoint-neutral restrictions can be imposed, for example, in the form of entirely prohibiting the discussion of a controversial subject, from all points of view.<sup>148</sup> This viewpoint-neutral restriction on professorial speech could, however, still amount to a burden on academic freedom not justifiable under an appropriate free speech test.

For these reasons, the major variations on the *Hazelwood* test either fit poorly with most academic freedom circumstances, or are likely to insufficiently protect academic freedom, given the purposes and mission of the universities and other relevant considerations and interests.

The main alternative to *Hazelwood* in deciding academic freedom cases has been one version or another of the *Pickering-Connick-Garcetti* line of cases.<sup>149</sup> Of these cases, *Garcetti*<sup>150</sup> is the most recent, and clarifies some issues, while leaving some issues unresolved and creating still others.

The plaintiff in *Garcetti* was Richard Ceballos, a deputy district attorney who claimed his supervisors retaliated against him because of his speech in recommending a particular disposition of a pending case.<sup>151</sup> These circumstances already illustrate that the *PCG* line of cases is really a broadly sweeping test for addressing free speech claims brought by public employees generally against their public employer. Most *PCG* cases will have little to do with academic freedom, as opposed to the free speech rights of government workers in all sorts of workplaces and tasks. The *PCG* test has not developed with any special sensitivity to university environments.<sup>152</sup>

As articulated in *Garcetti*, the government worker must first show that he or she spoke not as a government employee discharging his or her job responsibilities, but instead as a citizen.<sup>153</sup> Further, the speech uttered in one's capacity as a citizen rather than as an em-

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148. For general discussion of these ultimately murky distinctions, see, for example, *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 55, 59–62 (1983) (Brennan, J., dissenting); and Geoffrey R. Stone, *Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81 (1978). For a survey of the general murkiness and manipulability of these and related distinctions, see R. George Wright, *Content-Based and Content-Neutral Regulation of Speech: The Limitations of a Common Distinction*, 60 U. MIAMI L. REV. 333 (2006).

149. See *supra* notes 29–40 and accompanying text.

150. See *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006).

151. See *id.* at 1956.

152. In favor of the *PCG* test, however, is that if the plaintiff can actually reach the second phase or interest-balancing step, see *id.* at 1957, there is no reason why the *PCG* test should at that point be insensitive to academic interests raised by either an individual academic or the university administration.

153. See *id.* at 1958.

ployee must also substantively amount to speech "on a matter of public concern."<sup>154</sup>

These two apparently separable considerations must both be met if the speaker's case is to remain viable. If both considerations are deemed met, the speech at issue may or may not be protected depending on the outcome of a distinct interest-balancing stage. The Court has described this further stage<sup>155</sup> as

a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.<sup>156</sup>

Thus, when "employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively."<sup>157</sup> But, on the other hand, "when public employees . . . are not speaking as citizens for First Amendment purposes, the Constitution does not insulate their communications from employer discipline."<sup>158</sup>

The majority opinion by Justice Kennedy in *Garcetti*, in response to concerns raised by Justice Souter in dissent,<sup>159</sup> explicitly reserved for another day whether or not the *PCG* test, without further modification, could properly be applied in cases raising issues of academic freedom.<sup>160</sup> Neither Justice Kennedy nor Justice Souter substantively explored the question of the propriety of applying *PCG* in academic freedom cases.<sup>161</sup>

As it stands, the *PCG* test is poorly adapted to the context of university academic freedom issues with First Amendment implications. Consider first the often decisive question of the capacity—as an employee, or else, supposedly mutually exclusively, as a citizen—in which the professor or university official speaks. The Court recognizes that the line between employee speech in discharge of one's job responsibilities and one's speech as a citizen may on occasion be difficult to draw.<sup>162</sup>

But the main problem for the *PCG* test in the academic freedom area is not in drawing this line. It is instead that much of what academic freedom exists to protect amounts to speech by university employees, as employees, discharging job responsibilities as employees.

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154. *Id.* (citing *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968)).

155. *See id.* at 1957.

156. *Id.*

157. *Id.* at 1958 (citing *Connick v. Myers*, 461 U.S. 138, 147 (1983)).

158. *Id.* at 1960.

159. *See id.* at 1963, 1969–70 (Souter, J., dissenting, joined by Stevens & Ginsburg, JJ.).

160. *See id.* at 1962 (majority opinion).

161. See the brief portions of the respective opinions referred to *supra* notes 159–60.

162. *See Garcetti*, 126 S. Ct. at 1961–62.

University professors are expected, as a matter of their standard employment responsibilities, to engage in a number of activities plainly implicating academic freedom. Professors may gain credibility in speaking by engaging in job-fulfilling activities. These activities would include classroom lecturing and discussion, presenting papers and serving on academic panels, providing continuing education for graduates, communicating on behalf of professional organizations, publishing books and journal articles, and in some circles, contributing editorials or op-ed columns to newspapers, making radio and television appearances, and undertaking various forms of individual and collective blogging.<sup>163</sup>

Even the latter of these activities might well be thought to be undertaken in the exercise of professional job responsibilities,<sup>164</sup> yet each would be thought of as well as a natural home for the value of academic freedom. One could argue that some portion of the above sorts of speech activities is also engaged in as a citizen. But *PCG* by its own formulation does not allow for the possibility of speaking in a joint employee–citizen status.<sup>165</sup>

The Court might try to radically bypass this basic problem in academic freedom cases by focusing instead on whether or not the speech was a matter of public concern. Other issues, however, would even then arise. There are many and varied academic fields and specialties. Many academic specialties do not seek the public eye, but clearly still do directly implicate university missions and thus require academic freedom. In a number of academic contexts, there may be cutting edge academic controversies on the frontiers of knowledge that simply do not capture or even seek to capture any broader public notice or concern. Much of the speech we would wish to protect under the rubric of academic freedom thus does not fit neatly into either category of speech merely airing some personal employment grievance, or the more protectable category of speech that is genuinely on a subject of public concern.

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163. On the latter in particular, see, for example, Leigh Jones, *Blogging Law Profs Assault Ivory Tower: Is it Scholarship or Cyber Chit-Chat?*, NAT'L L.J., Feb. 27, 2006, at 1. For greater detail, also see the contributions associated with Berkman Center for Internet & Society at Harvard Law School, *The Bloggership: How Blogs Are Transforming Legal Scholarship*, <http://cyber.law.harvard.edu/home/bloggership>.

164. Op-ed columns and blog contributions might be thought in at least some instances to fall within the traditional division of scholarship and publication, teaching, and recognizable service. For discussion of these criteria, see, for example, Georgetown University, *Guidelines for Submission of Applications*, <http://president.georgetown.edu/ranktenure/submissionguidelines.html> (last visited July 1, 2006); and University of Oregon, *A Faculty Guide to Promotion and Tenure*, <http://academicaffairs.uoregon.edu/tenureguide> (last visited July 1, 2006).

165. See, e.g., *Garcetti*, 126 S. Ct. at 1960.

Even this much cannot be certain, since the courts have provided only limited, generalized guidance as to how to distinguish personal interest from MOPIC or public concern speech.<sup>166</sup> But especially if "public concern" has any subjective or popular element, some courts may have little inclination to hold as being matters of public concern those academic disputes about which the public simply does not care and could not grasp at a technical level even if did care. Academic disputes on (in this sense) obscure matters, in a realm of protected academic freedom, may directly advance the university missions of knowledge enhancement and even civilizational advancement without ever calling for or requiring public attention.<sup>167</sup>

It is certainly possible to argue that academic debate over matters such as global warming, epidemiology, tax policy, the law of war, and computer encryption either are or ought to be matters of genuine public concern. We must recognize, however, that many serious scholarly disputes in many other fields, despite their contribution to our understanding of the world and to cultural progress, will never be and need not be reflected in any popular communications medium. They involve speech on matters of public concern only in a sense to which the courts, at a minimum, do not consistently adhere.<sup>168</sup> Yet, speech on such matters, on some frontier of scholarly knowledge, requires and deserves academic freedom. In any area, professional jealousies, rivalries, vested interests, empire-building, careerism, and infighting

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166. See, e.g., *Rankin v. McPherson*, 483 U.S. 378, 395 (1987) (Scalia, J., dissenting) (noting the unhelpful circularity involved); *Connick v. Myers*, 461 U.S. 138, 147-48 (1983) (look to statement's "content, form, and context"); *Kirkland v. Northside Indep. Sch. Dist.*, 890 F.2d 794, 798 (5th Cir. 1989) ("The definition of 'matters of public concern' is imprecise."); see generally Stephen Allred, *From Connick to Confusion: The Struggle to Define Speech on Matters of Public Concern*, 64 IND. L.J. 43 (1988); R. George Wright, *Speech on Matters of Public Interest and Concern*, 37 DEPAUL L. REV. 27 (1987). For the distinction as drawn by then-Chief Judge Posner, see *Dishnow v. School District*, 77 F.3d 194, 197 (7th Cir. 1996). This MOPIC versus non-MOPIC distinction has no parallel, and is generally dispensed with, in protecting and regulating student speech. See *Pinard v. Clatskanie Sch. Dist.*, 446 F.3d 964, 974 (9th Cir. 2006).
167. See, e.g., David Madsen, *The American University in a Changing Society: Three Views*, 91 AM. J. EDUC. 356, 357 (1983) (referring to "[t]he university's invisible product, knowledge" (quoting CLARK KERR, *THE USES OF THE UNIVERSITY*, at viii (3d ed. 1982))). In a sort of middle ground at present is string theory, for example, where there are reasonably widely read popularizations of the subject that cannot possibly place non-mathematicians in a position to independently judge the merits of the arguments among academic specialists. For one such well-regarded treatment, see BRIAN GREENE, *THE ELEGANT UNIVERSE: SUPERSTRINGS, HIDDEN DIMENSIONS, AND THE QUEST FOR THE ULTIMATE THEORY* (2000).
168. Consider, for example, *Boring v. Buncombe County Board of Education*, 136 F.3d 364, 368 (4th Cir. 1998) (en banc), in which the en banc majority found that the 1991 selection of a high school play with themes of divorce, sexual orientation, and nonmarital children, though publicly controversial, did not amount to speech on a matter of public concern as opposed to a mere employee grievance.

may at any time threaten to exact a significant price for such speech.<sup>169</sup>

While it is again encouraging that the *Garcetti* majority held open the possibility of somehow modifying the test in an academic freedom context,<sup>170</sup> the above basic problems remain. Too much of the logic of *PCG*, whether defensible in other contexts or not, is appropriate only barely if at all in many academic freedom contexts.

Consider, for example, the implications of *Garcetti*'s view of public employees speaking in the course of carrying out their job responsibilities as agents of their state employer, as opposed to speaking as autonomous, independent actors. The Court disturbingly maintains that

[r]estricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created.<sup>171</sup>

On this view, speech in carrying out one's professional responsibilities is thus ultimately what we might call merely agentic speech, commissioned or created by,<sup>172</sup> paid for,<sup>173</sup> and thus fairly subject to control by the state.

There are doubtless spheres of life in which paying the piper fairly entitles one to call the tune.<sup>174</sup> But for any government, however

169. For a sense of the disappointment in some quarters over the perceived inability of string theory to generate testable hypotheses or to uniquely solve problems, despite its departmental high profile, see Posting of John Horgan to The Scientific Curmudgeon, [http://www.stevens.edu/csw/cgi-bin/blogs/scientific\\_curmudgeon/?p=26](http://www.stevens.edu/csw/cgi-bin/blogs/scientific_curmudgeon/?p=26) (June 29, 2006, 14:44 EST). See also Long Bets, <http://www.longbets.org/12> (documenting Horgan's wager with Michio Kaku on whether anyone will win a Nobel Physics Prize for the study of string (or another unified) theory by 2020, currently eliciting roughly equally divided support among voters at the site). And of course, any area of academic inquiry can provoke career-affecting professional rivalries, even if the debates are not popularized or even dimly reflected in any public concern. For further critical discussion of the MOPIC distinction in an academic context, see Ailsa W. Chang, *Resuscitating the Constitutional "Theory" of Academic Freedom: A Search for a Standard Beyond Pickering and Connick*, 53 STAN. L. REV. 915, 940–41 (2001).

170. See *Garcetti*, 126 S. Ct. at 1962. But cf. *Evans-Marshall v. Bd. of Educ.*, 428 F.3d 223, 233, 233–38 (6th Cir. 2005) (Sutton, J., concurring) (citing the court of appeal's opinion in *Garcetti* and concluding, in this high-school level teacher case, that "[t]he Supreme Court has never held that the First Amendment applies to a teacher's classroom speech, and there is good reason to think that it would not do so") (largely anticipating the logic of the Supreme Court's opinion in *Garcetti*, including a conception of high-school classroom teaching as agency).

171. *Garcetti*, 126 S. Ct. at 1960.

172. *Id.*

173. See *id.* (citing *Rosenberger v. Rector*, 515 U.S. 819, 833 (1995) (government entitled to promote its own speech message where it funds the activity in question)).

174. For some of the practical complications in the area of medical testing, see Nick Freemantle & Deborah Stocken, Editorial, *The Commercialization of Clinical Research: Who Pays the Piper, Calls the Tune?*, 21 FAM. PRAC. 335 (2004), available at <http://fampra.oxfordjournals.org/cgi/content/full/21/4/335>.



democratically constituted,<sup>175</sup> to think of the speech of all public university faculty as its own proprietary speech, paid for and thus rightly subject to state specification and potential dictation according to its preferences and contractual arrangements, is plainly and deeply incompatible with the logic of academic freedom.<sup>176</sup> This is not to suggest that the combination of a strong-willed but less expert official patron, in this case the state, and an equally strong-willed creative expert can never be productive.<sup>177</sup> But universities are built upon, and valuable because of, a combination of unique talents, diverse accumulated expertise, unshared training and insight, specialization and division of labor, an absence of distraction, free interaction and collaboration, rigor in recruitment and promotion, the gradual development of maturity of professional judgment, the practical liberation that only a sense of genuine security can widely purchase, and an underlying community ethos encouraging the pursuit of truth without fear or favor.<sup>178</sup>

Ultimately, the *Garcetti* model of university faculty as proxies, instruments, or agents expressing views approved of, if not specified by, the state paying for their performance undermines the mission and purposes of the worthy state university. Adding broadly to the treasury of scholarly knowledge simply cannot be reduced to carrying out anyone's wishes or preferences,<sup>179</sup> whether of any sitting government

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175. Or certainly any wealthy private corporation, industry, foundation, or individual.

176. See, e.g., *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (stating that First Amendment academic freedom "does not tolerate laws that cast a pall of orthodoxy over the classroom").

177. See, e.g., IRVING STONE, *THE AGONY AND THE ECSTASY* (1961) (reconstructing the relationship between Michelangelo and Pope Julius II with regard to the Sistine Chapel ceiling project).

178. See *supra* notes 51-79 and accompanying text. Some of these elements are conjoined in John R. Searle, *Two Concepts of Academic Freedom*, in *THE CONCEPT OF ACADEMIC FREEDOM* 86, 89 (Edmund L. Pincoffs ed., 1975). More abstractly, consider Benard Lonergan, *Insight: A Study of Human Understanding*, in 3 *COLLECTED WORKS OF BERNARD LONERGAN* 619 (Frederick E. Crowe & Robert M. Doran eds.) (Univ. of Toronto 2000) (1957) (noting "the detached, disinterested, unrestricted desire to know" that "heads beyond one's own joy in one's own insight to the further question whether one's insight is correct . . . independent of the individual's likes and dislikes, of his wishful and his anxious thinking"). For possible implications for academic freedom of treating even advanced university education as essentially a consumer product exchanged in a commercial transaction, see Cheryl A. Cameron et al., *Academic Bills of Rights: Conflict in the Classroom*, 31 J.C. & U.L. 243 (2005).

179. See Lonergan, *supra* note 178, at 619; Cameron et al., *supra* note 178. This of course is not to suggest that individual scholars should be entrusted to decide broader questions of what the university should emphasize in its offerings, what budgets will permit, what generally should and should not be subsidized, what schools should be opened, etc.

or of trustees or of university faculty themselves.<sup>180</sup> As John Stuart Mill classically recognized, truth is best pursued through independent-mindedness, individualism, decentralization, diligent study, and diversity of voices.<sup>181</sup> The location of truth in any given instance is best gauged, however fallibly, by transactions in an admittedly imperfect marketplace of ideas,<sup>182</sup> rather than as determined by any concentrated governmental or corporate entity.<sup>183</sup>

Other sorts of variations of the *Hazelwood* or the *PCG* tests have occasionally been applied in contexts of professorial speech.<sup>184</sup> Others

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180. See *id.* For anticipation, including in university settings, of *Garcetti's* agentic or state employer "proxy" theme, see, for example, *Brown v. Armenti*, 247 F.3d 69, 75 (3d Cir. 2001) (classroom speech as speech in which the professor serves as the university's proxy in carrying out the mission and the academic freedom of the university administration as an institution). See also *Cal. Teachers Ass'n v. Bd. of Educ.*, 271 F.3d 1141, 1149 & n.6 (9th Cir. 2001) (discussing classroom speech as ultimately government speech and on that basis regulatable by the government); *Lee v. York County Sch. Div.*, 418 F. Supp. 2d 816 (E.D. Va. 2006) (same discussion at the high school level). For brief critique of this agentic or proxy theory in a high school setting antedating *Garcetti*, see *Cockrel v. Shelby County School District*, 270 F.3d 1036, 1051–52 (6th Cir. 2001), and outside of any school context, *Rodgers v. Banks*, 344 F.3d 587, 599 (6th Cir. 2003) (also preceding *Garcetti*). See also Judith Jarvis Thompson, *A Proposed Statement on Academic Freedom*, in *THE CONCEPT OF ACADEMIC FREEDOM*, *supra* note 178, at 263, 264 ("It is both irrational and unjust to employ a person to do a thing and then to prevent him from doing it."). Of course, some universities or governments might be quite upfront and forthcoming about limits on academic freedom, but this hardly ensures that the knowledge discovery and transmission aims of universities are thereby being well executed.
  181. See MILL, *supra* note 99, at 76–77; see also DWORKIN, *supra* note 10, at 250 (independent ethical value of individual responsibility).
  182. See, classically, Justice Holmes' assertion that "the best test of truth is the power of the thought to get itself accepted in the competition of the market," *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). It is certainly possible to critique the model of the marketplace of ideas in various ways. See, e.g., Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1. But the upshot of such critiques is rarely thought to be that additional powers to determine what should be held to be academically true should be lodged in existing governments.
  183. Some aspects of alleged misconduct by government agencies can be addressed through whistleblower protection statutes, but such statutes can cover only a relatively small portion of academic freedom issues. See Zack, *supra* note 89, at 916–17; see generally Elletta S. Callahan & Terry M. Dworkin, *The State of State Whistleblower Protection*, 38 AM. BUS. L.J. 99 (2000); William M. Howard, *Common-Law Retaliatory Discharge of Employee for Disclosing Unlawful Acts or Other Misconduct of Employer or Fellow Employees*, 105 A.L.R. 5th 351 (2003).
  184. See, e.g., *Bishop v. Aronov*, 926 F.2d 1066 (11th Cir. 1991) (university professor restricted in interjecting religiously based personal beliefs or "biases" into classes in several formats), *cited in*, e.g., *Hosty v. Carter*, 412 F.3d 731, 735 (7th Cir. 2005) (en banc). *Bishop* seems to involve something of an ad hoc balancing of various test elements and other considerations, including references to *Hazelwood*, see *Bishop*, 926 F.2d at 1072 n.5 (limiting teacher autonomy in the classroom pursuant to *Hazelwood*); *Pickering*, see *id.* at 1072 (broad *Pickering*

are devisable. None to date, however, provides any indication of how to satisfactorily resolve any of the most basic problems associated with *Hazelwood* or the *PCG* cases in the context of constitutional academic freedom.

#### IV. CONCLUSION

We have seen that none of the tests widely employed in teacher free speech cases is even modestly well adapted to address academic free speech issues in university contexts. The current tests tend in crucial respects to underprotect academic freedom from the standpoint of the long-term public good.

Is there some obvious alternative to these generally inadequate tests? One alternative, familiar from other free speech contexts, would be to apply a strict scrutiny test<sup>185</sup> in the case of any significant potential regulatory threat to academic freedom. None of the tests examined above is as generally protective of academic freedom against government interference as strict scrutiny would be. Under a rule of strict scrutiny, such restrictions on academic freedom at public universities would require the government to show that the restriction in question was genuinely narrowly tailored to promote a compelling or overridingly vital government interest.<sup>186</sup>

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balancing taken "as our starting point"); *Hazelwood* again, see *id.* at 1074 (the "somewhat amorphous" balancing in *Bishop* "takes as its polestar [*Hazelwood*'s] concern for the 'basic educational mission' of the school," but only as that mission is conceived by the school administration, along with considerations of "context"); the perhaps unintended coercive effects of the professor's speech, see *id.*; the value of academic freedom, see *id.* at 1075 (but as limited in choice of curriculum); the limited scope of the university restrictions on the professor's speech, see *id.* at 1076; and the distinction between Professor Bishop as a "course instructor" and as an "independent educator or researcher," *id.* at 1076–77, with the circuit court ultimately upholding the limited restrictions imposed on Professor Bishop's speech, *id.*

185. For standard discussions of strict scrutiny in a variety of free speech contexts, see *Republican Party v. White*, 536 U.S. 765, 774–75 (2002) (judicial campaign speech); *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000); *Simon & Schuster, Inc. v. Members of New York State Crime Victims Board*, 502 U.S. 105, 118 (1991) (withholding crime-related book profits); *Sable Communications v. FCC*, 492 U.S. 115, 126 (1989) (telephone access to sexual speech); *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 222 (1989); *Boos v. Barry*, 485 U.S. 312, 321 (1988) (protests in the vicinity of foreign embassies); and *Perry Education Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37, 45 (1983) (insurgent teacher's union access to public school mailboxes). Note that while *Perry* helpfully suggests that speech restrictions in even nonpublic fora cannot be based on viewpoint, *id.* at 45–46, this principle was blurred by *Hazelwood*'s omission of such a requirement, and there is also the deeper problem of defining the purpose or scope of the nonpublic forum in the first place.

186. See cases cited *supra* note 185. The question of narrow tailoring considers not only any possible unnecessary breadth of the speech restriction, but also whether

This a stringent test, but it is widely applied in free speech contexts and certainly in some free speech contexts of lesser moment.<sup>187</sup> We live in an information-driven era,<sup>188</sup> with revolutions in computer technology, genetics, nanotechnology, and pharmacology in the offing. If this is so, it is difficult to deny the increasingly vital importance of the efficient promotion of the university's knowledge-related missions.<sup>189</sup> But the broader point is the importance of the unimpaired scholarly operation of the entirety of the university, across all academic departments, in all eras. All academic departments and their membership have their role to play in preserving, enhancing, and transmitting the best that has been thought and said.<sup>190</sup>

We need not argue, in fact, that promoting academic freedom and thereby the efficient furtherance of the university mission is always, or indeed ever, a compelling public interest.<sup>191</sup> All we need show is that significant potential regulatory threats to academic freedom should themselves promote, in an appropriately narrowly tailored way, some compelling public interest. And given the importance of the broad university missions and the need for academic freedom if they are to be effectively furthered, it is difficult to see strict scrutiny as anything but appropriate.

There will be, of course, many instances of government regulation that impinge upon academic freedom, but in only some nonthreatening way. A professor might be denied, for example, the right to teach a class at a specified time, or access to an office at some specified time, merely for ordinary building maintenance purposes. In such cases, strict scrutiny would be an unnecessarily stringent judicial test. Some such cases are classified under the rubric of content-neutral time, place, or manner restrictions on speech.<sup>192</sup> In those cases, the free

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the speech regulation is unduly severe, in some way disproportionate to the gravity or effect of the offending speech. *Id.*

187. See, e.g., *Sable Communications*, 492 U.S. at 117, 126 (protecting commercial use of sexually explicit prerecorded phone messages "popularly known as 'dial-a-porn'").
188. See, e.g., ERIK P. BUCY, *LIVING IN THE INFORMATION AGE: A NEW MEDIA READER* (2d ed. 2005).
189. See *supra* notes 51-68 and accompanying text. This is not to suggest that all significant basic advances in either these or other fields, now or at any point in history, are owed directly to the work of the universities, as distinct from all other cultural and economic institutions.
190. Cf. MATTHEW ARNOLD, *CULTURE AND ANARCHY* 6-7 (J. Dover Wilson ed., 1932).
191. See, e.g., *Sable Communications*, 492 U.S. at 126 (describing the need for a "legitimate interest").
192. See, e.g., *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). There are also a range of complex and difficult situations in which the individual professor speaks on a matter neither of merely personal interest nor within the professor's specialized expertise, as on a matter of significant university governance, and in a venue that neither reaches the broader public nor counts as scholarship, teaching, or service. It may be that in such cases, the principle that both faculty and

speech test is reduced a bit, requiring only reasonably narrow tailoring to a significant or substantial government interest, along with the availability of ample alternative channels for communicating.<sup>193</sup>

The more central concern, however, given the current *Hazelwood* and *PCG* tests, must be whether strict scrutiny is too rigorous and demanding. Here, we can only say that strict scrutiny would not absolutize academic freedom. Here, as elsewhere, strict scrutiny should not mean strict in theory and fatal in fact.<sup>194</sup> Academic freedom is extremely important, but it admittedly carries opportunity costs and tradeoffs of varying severity.

Academic freedom exists against a background of institutional and community expectations of continuing academic achievement and minimum standards of behavior.<sup>195</sup> There may be, to begin with, a wide range of conflicts between the academic freedom of individuals or groups and the academic freedom of the university itself in the sense of institutional autonomy.<sup>196</sup> What amounts to the free speech interests of one person or group may also conflict with the free speech interests of another person or group.<sup>197</sup> Free speech rights, including academic freedom claims, may in addition conflict with constitutional<sup>198</sup> and nonconstitutional<sup>199</sup> rights of other persons. Academic

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administration should be able to freely communicate their responsible and well-considered sentiments should be respected largely as a matter of sensible organizational management principles.

193. See *id.* Actually, the familiar distinction between content-based and content-neutral restrictions on speech is remarkably murky and does not invariably track the seriousness of any potential threat to free speech values. See Wright, *supra* note 148, at 333–37, 364–65.
194. See *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003).
195. For discussion, see authorities cited *supra* note 60; Anne Colby & Thomas Ehrlich, *From Ideology to Inquiry*, INSIDE HIGHER ED., June 2, 2006, <http://www.insidehighered.com/layout/set/print/views/2006/06/02/ehrlich>. For further discussion, see *Pugel v. Board of Trustees*, 378 F.3d 659, 668 (7th Cir. 2004); and Stanley Fish, Editorial, *Conspiracy Theories 101*, N.Y. TIMES, July 23, 2006, at 13.
196. See *supra* notes 79–98 and accompanying text. In a sense, any university attempt to discipline an individual professor for speaking is itself a form of “speech” on the part of the university as an institution. But even where the university is prevented from restricting the professor’s speech, the university will still be free to literally say anything it wishes to say, including maintaining silence, on the subject of the individual professor’s speech.
197. For extended broad discussion, see R. George Wright, *Why Free Speech Cases Are As Hard (and As Easy) As They Are*, 68 TENN. L. REV. 335 (2001).
198. For an attempt to use some standard basic understandings of the idea of human dignity to guide the adjudication of some of these tradeoffs, see Wright, *supra* note 55.
199. By extension, see *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1534–36 (M.D. Fla. 1991), a case rejecting a free-speech defense against a Title VII claim of sexual harassment via speech. See also *EEOC v. Preferred Mgmt. Corp.*, 216 F. Supp. 2d 763 (S.D. Ind. 2002) (alleged workplace religious discrimination under Title VII).

freedom might, in a rare case, also come into genuine conflict with a compelling public interest not entirely reducible to claims of individual right.<sup>200</sup>

In light of all these basic conflicts, there is every potential for some direct and meaningful restrictions on academic freedom to pass a strict scrutiny test, if the restriction in question is sufficiently well crafted. Strict scrutiny thus, in our context, amounts to a sensible middle ground between idolizing academic freedom and the current failure on the established judicial fronts to fully recognize the public importance of academic freedom.

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200. Imagine a variation on the facts of *United States v. Progressive, Inc.*, 467 F. Supp. 990 (W.D. Wis. 1979), a case involving a temporary restraining order, granted despite the strong constitutional bias against what amounts to licensing of publications and prior restraint, in the case of a claim of a national security interest against publishing an article entitled *The H-Bomb Secret: How We Got It, Why We're Telling It*. Consider similar states of facts, set on public university campuses, involving other perhaps dangerous technologies, or discussing encryption technologies in some assertedly dangerous way. For a case preliminarily discussing export controls over expressive or speech-embodying encryption technologies, see *Junger v. Daley*, 209 F.3d 481 (6th Cir. 2000).